

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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ADIAHA A. RUANE, :  
:  
Plaintiff, : 17-CV-3704 (PKC)  
:  
v. : 225 Cadman Plaza East  
:  
BANK OF AMERICA, N.A., *et al.*, : Brooklyn, New York  
:  
Defendants. : September 26, 2018  
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TRANSCRIPT OF CIVIL CAUSE FOR MOTION HEARING  
BEFORE THE HONORABLE PEGGY KUO  
UNITED STATES MAGISTRATE JUDGE

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Proceedings recorded by electronic sound recording, transcript  
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1 (Proceedings began at 10:07 a.m.)

2 THE CLERK: The Honorable Magistrate Judge Peggy Kuo  
3 presiding. Civil cause for motion hearing, docket  
4 number 17-CV-3704, Ruane v. Bank of America, N.A., et al.

5 Counsel, please state your name for the record,  
6 starting with the plaintiffs.

7 MS. WEISSMAN: Good morning, Your Honor. Eve  
8 Weissman, New Economy Project, for plaintiff.

9 MR. BROMBERG: Brian Bromberg, Bromberg Law  
10 Office, P.C., for the plaintiff. Good morning, Your Honor.

11 MS. SHIN: Good morning, Your Honor. Susan Shin,  
12 New Economy Project, for the plaintiff.

13 MR. DESPOTAKIS: Good morning, Your Honor.  
14 Constantine Despotakis, counsel for defendant Bank of America.

15 MR. WEISSBERG: Good morning, Your Honor. Aaron  
16 Weissberg with Bank of America. Thank you.

17 MR. WAIT: And John Wait of Fox Rothschild on behalf  
18 of Chex Systems, Inc.

19 MS. HANSON: And on the phone is Cindy Hanson from  
20 Troutman Sanders for Early Warning Services.

21 THE COURT: All right. Good morning, everyone. So  
22 we're here to consider two discovery motions. One was filed  
23 by Bank of America seeking documents and discovery from the  
24 plaintiff, and the other is from the plaintiff seeking  
25 additional -- seeking to compel discovery from Bank of America

1 as well as Chex Systems. So I'd like to start first with the  
2 Bank of America motion to compel. I recall that I had  
3 considered something similar earlier and so I guess I'm a  
4 little more familiar with those particular issues. So let me  
5 hear from Mr. Despotakis how this is different from what we  
6 discussed earlier.

7 MR. DESPOTAKIS: Yes, Your Honor. As you may  
8 recall, in the last round we had a telephone conference where  
9 we addressed the issues, and the conclusion of that conference  
10 was that we would basically be briefing it again more fully  
11 with case citations and applicable law, which we have done,  
12 and that brings us back full circle today.

13 From Bank of America's point of view we are seeking  
14 three distinct types of items and information. The first is  
15 the identification by the plaintiff of all her servers, all  
16 her internet suppliers, all her cell phone providers for a  
17 period of time, and we've backed off a little bit on that  
18 period of time. We pulled it back to --

19 MR. WEISSBERG: One year before and three months  
20 after.

21 MR. DESPOTAKIS: -- to one year before the deposit  
22 of the checks and to three months afterwards, for that  
23 shortened period of time. The second category --

24 THE COURT: You're also seeking to identify her  
25 devices.

1 MR. DESPOTAKIS: And her devices.

2 THE COURT: Right. Okay.

3 MR. DESPOTAKIS: All her internet providers, her  
4 devices, her cell phones, all her means of communications for  
5 that limited time period.

6 THE COURT: Okay.

7 MR. DESPOTAKIS: The second category of information  
8 we're seeking relates to her prior banking relationships,  
9 again for a somewhat reduced period of time --

10 MR. WEISSBERG: Two years prior and one year  
11 subsequent.

12 MR. DESPOTAKIS: -- two years prior and one year  
13 subsequent to the deposit of the checks in question. The  
14 third category we are seeking is her tax returns, and that too  
15 is limited --

16 MR. WEISSBERG: Five years.

17 MR. DESPOTAKIS: -- to five years prior to the date  
18 of the deposit of the checks. Each of these categories, for  
19 the reason that we've expressed in our motion papers, are  
20 critical before we can proceed to the deposition stage of the  
21 plaintiff, and each, as we have requested and for the reasons  
22 we briefed, represent a distinct line of inquiry to which we  
23 believe we are entitled in defending this case and defending  
24 it effectively for our client.

25 The plaintiff's complaint is -- especially the

1 amended complaint as filed, really is a shotgun approach  
2 melding not only federal causes of action, but state causes of  
3 action, including I think under California, was the last time  
4 I looked, as well as New York. There are issues alleging not  
5 only to violations -- alleged violations of the Fair Credit  
6 Reporting Act, but the plaintiff raises issues as to damages,  
7 as to state law causes of action for defamation. And each of  
8 these, again for the reasons we've briefed to the Court, are  
9 legitimate and a source of concern before we can have an  
10 effective deposition of the plaintiff.

11           The communication devices -- I'll just lump them in  
12 one category as communication devices, whether they were  
13 internet, cells, whatever -- it is critical that we find out  
14 with whom the plaintiff was communicating. The bank reached,  
15 from its point of view, a reasonable decision based on the  
16 facts it had before it and as presented by the plaintiff, but  
17 from its own records, that she was or may have been involved  
18 in the actual process and fraud that led to the deposit of  
19 those five checks. Therefore, it is important, based on those  
20 facts, that we get to the bottom of with whom she was  
21 communicating.

22           The bank is familiar with the ring of fraudsters  
23 that are out there. When I say "the bank," I'm talking about  
24 the bank's security officers and the folks who investigated  
25 this. This has become, you know, somewhat common knowledge.

1 They know what's out there. And we need to identify, who was  
2 she talking to leading up to this; who was she talking to  
3 shortly after this happened?

4 The facts upon which the bank based its decision to  
5 report Ms. Ruane to Chex Systems and EWS at the time are the  
6 same facts that are driving her complaint, and the only thing  
7 that she has presented is just her protestation that, "I  
8 didn't do it. I wasn't involved. I don't know what  
9 happened." Yet the deposits were effected through an Android  
10 device linked to her -- or I'm sorry, to a cell phone --

11 MR. WEISSBERG: A cell phone; Android cell phone.

12 MR. DESPOTAKIS: -- an Android cell phone device  
13 linked to her, including very specific identifying features to  
14 it that the bank was able to determine it was she at the other  
15 end of that. All those facts come into play, and whether you  
16 look at it from the point of view of the federal causes of  
17 action or from the state causes of action that she's  
18 asserting, certainly when you bring in defamation you bring  
19 issues of damages. You bring in all those other -- or the  
20 panoply of other alleged wrongs and repercussions that the  
21 plaintiff has allegedly suffered.

22 What we are asking for is both reasonable, it's  
23 rational, and it certainly is part of the liberal discovery  
24 that the Federal Rules provide, and we think we're entitled to  
25 that.

1 THE COURT: Even under the 2015 amendments that you  
2 failed to cite?

3 MR. DESPOTAKIS: Yes, we do think that, Your Honor.  
4 The second category, if I may move on just to give you a  
5 little thumbnail sketch, the second category of the prior  
6 banking arrangements that she had with whatever financial  
7 institution, that too is critical because we need to know, did  
8 she file similar claims with those other institutions? Were  
9 there similar circumstances where she was alleging the same  
10 kinds of things that she's alleging here regarding her  
11 checking account, the funneling of any counterfeit or spurious  
12 checks through that account? That too we think is certainly  
13 something that we have the right to delve into if we are to  
14 properly defend the bank and to defend its conclusions, based  
15 on the same set of facts that the plaintiff is alleging.

16 It's important that we see that there's a pattern to  
17 this. It's important that we see what the plaintiff has done  
18 with these other institutions. Has she been paid off on prior  
19 claims like this, similar to this? Has there been any taint  
20 with her in these other prior institutions? For the same  
21 reasons that I've expressed, it certainly seems to me relevant  
22 and directly on point for us to have the ability to delve into  
23 those raw facts and then proceed to deposition.

24 Finally, the tax returns. Given the damages that  
25 she is alleging, given the state causes of action that she's



1 asserting, given the very nature of the fraud that took place  
2 here, when you juxtapose it against the bank's conclusion that  
3 this was a sold account scenario --

4 THE COURT: I'm sorry, a sold?

5 MR. DESPOTAKIS: A sold count scenario.

6 THE COURT: Okay.

7 MR. DESPOTAKIS: She sold the information to her  
8 account so that these checks could be funneled through her  
9 account.

10 THE COURT: She sold somebody the information?

11 MR. DESPOTAKIS: Correct.

12 THE COURT: Okay.

13 MR. DESPOTAKIS: Right. You know, it's important to  
14 find out, as to that piece of it, what was her financial  
15 picture like? Did she report any losses on her tax returns,  
16 for example, relating to what happened in prior events  
17 regarding similar transactions or not? We're not trying to  
18 delve into the entirety of her financial picture, but we want  
19 to see, what was her income? We want to see, did she declare  
20 any losses arising out of maybe similar incidents at prior  
21 banks? I'm not a tax expert, but we want to see what's there.  
22 And tax returns are not magical. There is a confidentiality  
23 order in place. We can possibly discuss some suitable  
24 redaction that would make sense, but we're really eager to see  
25 what is in there. There may be nothing at the end of the day,

1 but we shouldn't be precluded from getting at that  
2 information, is my point.

3 I think the entirety of plaintiff's opposition to  
4 our motion really doesn't point to the Court's denying, you  
5 know, a party the right to get that discovery. It simply  
6 points to the fact that in various cases they were deemed  
7 relevant, and relevancy and direct impact on our ability to  
8 defend and take an effective deposition of the plaintiff is  
9 really our point. That's our guiding principle in this  
10 motion. That's the relief we're seeking.

11 THE COURT: Okay. So I have a couple of questions.

12 MR. DESPOTAKIS: Yes.

13 THE COURT: With regard to the servers, the cell  
14 phone providers and devices, I assume it's -- you're getting  
15 that info -- you're seeking that information so that you can  
16 do further discovery, right, with third-party subpoenas?

17 MR. DESPOTAKIS: Correct, Your Honor.

18 THE COURT: Right. And you will be seeking, I  
19 presume, records of phone calls that she made?

20 MR. DESPOTAKIS: Correct.

21 THE COURT: And you will be seeking -- as far as the  
22 internet --

23 MR. DESPOTAKIS: And emails.

24 THE COURT: -- and emails, and the internet  
25 providers would be for what?

1 MR. DESPOTAKIS: The internet providers would be to  
2 give us copies of communications, of the emails, perhaps --

3 THE COURT: Oh, it's for emails? I mean --

4 MR. DESPOTAKIS: For emails.

5 THE COURT: -- when you say "internet providers," I  
6 wasn't sure if those would then be like search engines, right?

7 MR. DESPOTAKIS: Yeah. We're saying --

8 THE COURT: So if somebody searches -- you know, the  
9 search history doesn't seem like that would be relevant,  
10 right?

11 MR. DESPOTAKIS: No, we're looking for really text,  
12 emails, telephone calls.

13 THE COURT: Okay.

14 MR. DESPOTAKIS: Those are the --

15 THE COURT: And --

16 MR. DESPOTAKIS: -- three sets of items.

17 THE COURT: Okay. So --

18 MR. DESPOTAKIS: And if you recall, Your Honor,  
19 based on what happened at the last telephonic conference  
20 leading to today, you had instructed us -- obviously, this is  
21 an issue in play and we of course refrained from serving any  
22 subpoenas pending --

23 THE COURT: Yes.

24 MR. DESPOTAKIS: -- your decision.

25 THE COURT: Yes, right, so I appreciate that. But

1 the issue there is, you think that there -- plaintiff -- or  
2 your investigation concluded that the plaintiff did engage in  
3 wrongdoing and you want to see if she communicated with the  
4 wrongdo -- with the ring of criminals, as you call them?

5 MR. DESPOTAKIS: Correct.

6 THE COURT: Okay.

7 MR. DESPOTAKIS: And --

8 THE COURT: So who are you seeking -- do you have  
9 specific phone numbers or identities of people that you're  
10 looking to see if she had communications?

11 MR. DESPOTAKIS: The bank would -- here's the  
12 Catch-22. The bank's investigators would know certain numbers  
13 that they already have --

14 THE COURT: Right.

15 MR. DESPOTAKIS: -- information on that definitely  
16 are fraudsters --

17 THE COURT: So why can't you --

18 MR. DESPOTAKIS: -- but they wouldn't be able to  
19 identify -- they might be able to identify others that are in  
20 these records once they go through them.

21 THE COURT: Right, but then you're just -- they  
22 might iden -- so there are some phone numbers that you already  
23 know --

24 MR. DESPOTAKIS: Right --

25 THE COURT: -- that you're looking for?

1 MR. DESPOTAKIS: -- and there are some that might  
2 come to light based on --

3 THE COURT: And come to light in what way?

4 MR. DESPOTAKIS: In reviewing the numbers that  
5 appear or the addressees of the emails or the addressees of  
6 the texts. I'll lump them all together again for one  
7 discussion. The bank will go through those and if those --  
8 any of those once reviewed lead to information as to a known  
9 ring that uses that information that has that email address,  
10 that has that text number or that telephone number, the bank  
11 will be able to determine that, but --

12 THE COURT: So does the bank have --

13 MR. DESPOTAKIS: -- it's entitled to --

14 THE COURT: Does the bank have an algorithm or a  
15 list of known rings?

16 MR. DESPOTAKIS: My understanding is that its  
17 security department I think does have, the extent to which  
18 they've dealt with fraud cases in whole -- you know, of all  
19 types involving the bank. There's a distinct fraud and  
20 corporate security unit that would certainly be able to make  
21 sense of the information that might be contained in these  
22 documents.

23 THE COURT: And I presume that that information will  
24 be turned over in the course of discovery --

25 MR. DESPOTAKIS: Yes.

1 THE COURT: -- to the plaintiffs?

2 MR. DESPOTAKIS: Oh, absolutely. We're not --

3 THE COURT: To the plaintiff, rather?

4 MR. DESPOTAKIS: Yeah, yeah.

5 THE COURT: Okay. So if they seek to get the phone  
6 numbers of the known ring people, you will turn those over?

7 MR. DESPOTAKIS: Absolutely.

8 THE COURT: Okay.

9 MR. DESPOTAKIS: Yeah.

10 THE COURT: So --

11 MR. DESPOTAKIS: We're simply saying that it's a  
12 point of discovery that we are entitled to.

13 THE COURT: Right. So you want to get the phone  
14 records and the texts and the email first so you can run it  
15 against what the bank has --

16 MR. DESPOTAKIS: Right.

17 THE COURT: -- and if the bank has any hits --

18 MR. DESPOTAKIS: That's right.

19 THE COURT: -- then you will turn that over to  
20 plaintiff to let her and her lawyers know that you found some  
21 hits and that it supports your theory of the case.

22 MR. DESPOTAKIS: Absolutely, Your Honor. And this  
23 was never meant to suggest we would withhold that information  
24 from plaintiff.

25 THE COURT: Okay. No, I just wanted to know.

1 MR. DESPOTAKIS: Yeah.

2 THE COURT: And do you have -- since the bank did an  
3 investigation, are you in a position to turn over the known  
4 numbers now?

5 MR. DESPOTAKIS: To my recollection, Your Honor, I  
6 think we can produce -- there's at least one number that the  
7 bank knows, but I would point out that the only phone records  
8 that plaintiff produced to us was a heavily redacted, I think  
9 one month or two months of her Sprint bill --

10 MR. WEISSBERG: Yes.

11 MR. DESPOTAKIS: -- heavily redacted as to other  
12 information, so --

13 THE COURT: Yes, I appreciate that, but I just  
14 wanted to make sure that you're sharing -- that you have  
15 knowledge of at least a phone number that you're looking for  
16 and that you --

17 MR. DESPOTAKIS: Yes, yeah.

18 THE COURT: -- have shared that or will share that.

19 MR. DESPOTAKIS: That's one, subject to whatever  
20 else might be located there that would click or that would be  
21 a hit for the bank once it investigates it. And again, within  
22 the context of the confidentiality order that's in place, I  
23 have no problem with turning that over to the plaintiff.

24 THE COURT: Okay. So -- and then you've made the  
25 other argument that because there's a defamation suit, you're

1 entitled to find out whether in fact the plaintiff was engaged  
2 in fraud, even if that wasn't the subject of the investigation  
3 initially, right? I mean, there are two parts of it; one is  
4 whether the bank did a reasonable investigation. The bank --  
5 the bank's investigation is done so you can't now add on to it  
6 to say it's reasonable, right?

7 MR. DESPOTAKIS: I would answer that two ways, Your  
8 Honor --

9 THE COURT: Okay.

10 MR. DESPOTAKIS: -- if I may? Okay. The first part  
11 of it, if I understood you correctly -- look, the bank did its  
12 investigation, it had certain facts before it, and we say it  
13 came to a reasonable conclusion that she was or may have been  
14 involved, and therefore met the requirements of the statute in  
15 so doing. The state causes of action that she's asserted, you  
16 know, truth is a defense. She --

17 THE COURT: Right, that's what I meant.

18 MR. DESPOTAKIS: Yeah.

19 THE COURT: So there are two parts of it; one is the  
20 reasonableness, and the reasonableness is looked at at the  
21 time that the investigation happened, not today.

22 MR. DESPOTAKIS: That's correct.

23 THE COURT: So you can't add things now to say that  
24 this is reasonable, right?

25 MR. DESPOTAKIS: No, I --



1 THE COURT: That's the first part.

2 MR. DESPOTAKIS: Yeah.

3 THE COURT: The second part is the defamation, so  
4 you're saying with defamation, because truth is a defense,  
5 you're entitled to get to the truth to say no matter what you  
6 were thinking or what you knew back then, in fact she engaged  
7 in this conduct that was the --

8 MR. DESPOTAKIS: Well --

9 THE COURT: -- topic of the defamation statement,  
10 defamatory statement.

11 MR. DESPOTAKIS: Right. Yeah, but I would add a  
12 little bit to it.

13 THE COURT: Okay.

14 MR. DESPOTAKIS: One point that Mr. Weissberg said  
15 to me, we do have the principle of unjust enrichment. She  
16 certainly should not be allowed to make out a case under the  
17 state causes of action, and even under the federal cause of  
18 action.

19 THE COURT: So the unjust enrichment is your  
20 defense, right --

21 MR. DESPOTAKIS: It's our defense.

22 THE COURT: -- and you're saying, "What's the  
23 enrichment and what's the unjustness?"

24 MR. DESPOTAKIS: That -- well, it would go -- unjust  
25 enrichment is one piece of it; damages that she's claiming

1 would be a second --

2 THE COURT: Yeah, I understand the damages.

3 MR. DESPOTAKIS: -- but on the unjust --

4 THE COURT: Tell me about the unjust enrichment.

5 MR. DESPOTAKIS: On the unjust enrichment, if she  
6 had a hand in this fraud and it's demonstrated and it's  
7 concluded that the bank had a reasonable investigation, so you  
8 put that in one column, and then you go to the rest of it, if  
9 it's demonstrated that she really did have something to do  
10 with this one way or another, to reward her by a recovery in  
11 this case would certainly be her unjust enrichment. At that  
12 point she would have committed in essence a fraud on the  
13 court, a fraud on the parties. She's taking the position she  
14 had nothing to do with it.

15 THE COURT: Right, I understand. And so I'm not  
16 sure that's unjust enrichment, because she hasn't yet been  
17 enriched --

18 MR. DESPOTAKIS: Not yet.

19 THE COURT: -- so it's more of a clean hands  
20 argument that she shouldn't recover here, because --

21 MR. DESPOTAKIS: She should not recover, Your Honor.  
22 She shouldn't be --

23 THE COURT: Right, but it's not really unjust  
24 enrichment, technically.

25

1 MR. DESPOTAKIS: Whatever theory we wind up going  
2 under.

3 THE COURT: Okay.

4 MR. DESPOTAKIS: We've said unjust enrichment.

5 THE COURT: So -- okay.

6 MR. DESPOTAKIS: You're right, Your Honor.

7 THE COURT: That's why I was confused as to what she  
8 was enriched with.

9 MR. DESPOTAKIS: Yeah, she --

10 THE COURT: She hasn't been --

11 MR. DESPOTAKIS: Right. She should not --

12 THE COURT: -- you just don't think she should  
13 recover.

14 MR. DESPOTAKIS: -- be rewarded --

15 THE COURT: Okay. I get that.

16 MR. DESPOTAKIS: -- at the end of the day.

17 THE COURT: All right. So let me turn to the prior  
18 banking issue. So you want to know whether she has made  
19 similar claims because you're saying that she's part of this  
20 ring of criminals, and so whether she did it in the past would  
21 be important. You want to know what banks she has had  
22 relationships with and then you would again do a third-party  
23 subpoena to find out if she's made claims.

24 MR. DESPOTAKIS: Right.

25 THE COURT: Is that right?

1 MR. DESPOTAKIS: If I may, Your Honor, just back to  
2 the last point for half a second? Under 15  
3 U.S.C. 1693(a)(12), the statute does not include any  
4 electronic funds transfers that were made with a fraudulent  
5 intent by the consumer --

6 THE COURT: Yes, I understand that.

7 MR. DESPOTAKIS: -- so that also harks back to that  
8 issue that we talked about a moment ago. In terms of the  
9 banking records -- I'm sorry, we're up to the banking records  
10 or to the --

11 THE COURT: The prior relationships.

12 MR. DESPOTAKIS: The prior relationships --

13 THE COURT: My question was, I assume that you'll be  
14 seeking bank records. Once you identify the banks, you'll be  
15 seeking records from them as to whether she made prior  
16 complaints?

17 MR. DESPOTAKIS: Yeah. And in terms of the records  
18 we'll be seeking, it would be a two-step process. We would  
19 first get the information as to what banks she did business  
20 with. And our intention is to simply focus on, not  
21 necessarily each and every transaction, but we would like to  
22 know whether she made any claims similar to the type of claim  
23 alleged here or any claims that involved alleged wrongdoing or  
24 issues of dishonesty involving her account, because that too  
25 would bespeak to a mindset on the part of the plaintiff and

1 perhaps add some added picture to the issue of motive and what  
2 this plaintiff is all about, or not -- or not, but that's  
3 important. We need to know what she did --

4 THE COURT: So you won't be seeking, you know, her  
5 monthly statements, you'll just be asking the banks to turn  
6 over information as to whether she made prior complaints?

7 MR. DESPOTAKIS: Right, and then particularly  
8 whether she made any complaints regarding spurious check  
9 deposits.

10 THE COURT: Yes, that's what I mean --

11 MR. DESPOTAKIS: Correct.

12 THE COURT: -- but that's all you're looking for.  
13 You're not looking at her bank -- her monthly statements to  
14 see her individual transactions?

15 MR. DESPOTAKIS: We may need to know not so much  
16 individual transactions, but we would need to know monthly  
17 account balances, because one of the things she's claiming in  
18 this litigation is that, you know, she was receiving a pension  
19 from Ireland. She did some work, she had a job, and she's  
20 claiming damages by what Bank of America allegedly caused her  
21 to suffer by reason of the reports of EWS and Chex. So it  
22 seems to me, if she's alleging damages, we need to know that  
23 she had funds or what kind of funds that she's typically had  
24 over the years that would allow us --

25 THE COURT: Typically?

1 MR. DESPOTAKIS: Well, yeah, if she's got --

2 THE COURT: Well --

3 MR. DESPOTAKIS: -- all kinds of money in this other  
4 bank or banks and all of a sudden she's not showing it, and  
5 she's saying, "I had no money because Bank of America, I  
6 couldn't negotiate my Irish pension that was due to me," in  
7 the meantime she's got \$6,000, \$10,000 sitting here or there,  
8 we'd like to know that, because that puts --

9 THE COURT: Okay. So this would counteract -- this  
10 will counter her claim that she ran out of money and was  
11 forced to do certain things.

12 MR. DESPOTAKIS: Right.

13 THE COURT: So if the bank account -- these other  
14 bank accounts show that there was money, then the damages  
15 would be lower because she didn't suffer the harm she's  
16 alleged --

17 MR. DESPOTAKIS: And if we see money there that  
18 rapidly disappeared around the time of this incident, that  
19 leads to yet other issues.

20 THE COURT: Well, I mean, what --

21 MR. DESPOTAKIS: Yeah, that's why it's important.

22 THE COURT: I suppose you could argue it one way or  
23 the other, because that would certainly also then support the  
24 plaintiff's claim that she had expenses that she had to pay,  
25 and that's why the money was being drained.

1 MR. DESPOTAKIS: Yeah. The point is, we need to  
2 see.

3 THE COURT: Okay. So you're looking for monthly  
4 account balances --

5 MR. DESPOTAKIS: Right.

6 THE COURT: -- as well as similar claims?

7 MR. DESPOTAKIS: Right.

8 THE COURT: All right. So then the third one is  
9 about the tax returns. So the tax returns you said you'd be  
10 willing to limit, so tell me how you -- what specific items  
11 you're looking for. You said you wanted to see if there were  
12 reported losses, right?

13 MR. DESPOTAKIS: Right. We'd like to see her income  
14 reported and any reported losses.

15 THE COURT: So income and losses?

16 MR. DESPOTAKIS: Right.

17 THE COURT: That's it?

18 MR. DESPOTAKIS: Yeah.

19 THE COURT: Okay.

20 MR. DESPOTAKIS: That's it, Your Honor, that's all  
21 we would need. And again, all of this will go into the mix  
22 for the eventual deposition of the plaintiff.

23 THE COURT: Right. Okay, great. Thank you.

24 MR. DESPOTAKIS: Thank you.

25 THE COURT: So then let me hear --

1 MR. DESPOTAKIS: Thank you, Your Honor.

2 THE COURT: -- from Ms. Weissman.

3 MS. WEISSMAN: Thank you, Your Honor. Your Honor,  
4 the information that defendant Bank of America is seeking is  
5 highly intrusive and invasive --

6 THE COURT: Well, if you brought the suit, you --  
7 there are certain risks that you take --

8 MS. WEISSMAN: That's --

9 THE COURT: -- so the question isn't about whether  
10 it's intrusive; the question is whether it's relevant.

11 MS. WEISSMAN: And also whether it's proportional,  
12 so --

13 THE COURT: Well, we're not at proportionality yet.  
14 I think first is you've argued that it's not relevant, so let  
15 me hear your argument there.

16 MS. WEISSMAN: Bank of America, there seems to be  
17 two broad categories of why this information is needed. One  
18 is to prove that she was somehow involved in this fraud. Bank  
19 of America, through the course of this litigation, has  
20 routinely said that the reason that the bank believed she was  
21 involved was because she was a person who was of modest  
22 means --

23 THE COURT: Well, no, let's put that aside. They  
24 said they did an investigation, okay, so they said --

25 MS. WEISSMAN: Their --



1           THE COURT: Hold on. They said they've done an  
2 investigation and so they have certain information and they  
3 want to cross-check it against your client's information. Why  
4 shouldn't they be allowed to do that?

5           MS. WEISSMAN: Judge, this is information that they  
6 have not turned over through the course of discovery. We have  
7 certainly requested any information related to the  
8 investigation that was performed. Today for the first time I  
9 heard that they have some reason to believe that the Android  
10 phone that deposited these fraudulent checks was somehow  
11 connected to our client. I've never heard that alleged before  
12 in this litigation and I have no idea what basis they have for  
13 this. They certainly haven't turned anything over to this  
14 effect.

15           Similarly, counsel alluded to a "sold" account scam  
16 fraud. They did produce some documentation in discovery about  
17 a sold account fraud, although it specifically has to do with  
18 recent college graduates. Nothing about the information that  
19 they turned over in discovery reports regarding this sold  
20 account fraud or sold account scam connects in any clear way  
21 to our client. And again, they just -- they seem to be basing  
22 their request for this information on some secret knowledge  
23 they have to connect her to what happened here, but they  
24 haven't turned it over to us.

25           THE COURT: Okay. So if they turn that over, then

1 this is then relevant, right?

2 MS. WEISSMAN: Well, if they have some basis to  
3 connect our client to this fraud, other than to say that she's  
4 a low-income person and the logical conclusion of that seems  
5 to be that any time a low-income person --

6 THE COURT: Yes, I know -- I've heard and that is  
7 not an argument that should be the main point here, but what  
8 I've heard from Mr. Despotakis is that the bank did an  
9 investigation and that they came to the conclusion that your  
10 client was involved somehow, and that -- and therefore they  
11 should be entitled to -- and you've made a defamation claim,  
12 so they're entitled to in fact -- to find out what in fact is  
13 the truth, because truth is a defense.

14 MS. WEISSMAN: Truth is certainly a defense, Your  
15 Honor, but again, I mean, they're basing this not on anything  
16 as far as we can tell. So I think the main question, as you  
17 pointed out, the first question certainly is whether it's  
18 relevant, and we would strongly argue that none of this is  
19 relevant until they have provided some reasonable basis beyond  
20 just these sort of broad far-fetched allegations supported by  
21 nothing to say that she was not involved. We, it's true, have  
22 said and alleged that she was not involved, but we've  
23 certainly provided facts to support that, one of the key facts  
24 being the fact that she reported this fraud --

25 THE COURT: Right.

1 MS. WEISSMAN: -- to Bank of America --

2 THE COURT: Okay.

3 MS. WEISSMAN: -- before anything was withdrawn. So  
4 just to answer your question about, if it was shown, if  
5 they -- if the bank did turn over some information that  
6 perhaps connected her or at least provided some reasonable  
7 basis why they think she was connected to this, then I would  
8 say that, okay, the question of relevance has now been  
9 addressed. So the next question though would be turn to  
10 proportionality and whether or not these are in fact documents  
11 that are needed to discover the information that the bank is  
12 requesting or if other information is available.

13 THE COURT: What other information are you  
14 proposing?

15 MS. WEISSMAN: Sure. So for example, information  
16 about her phone records to see who she's communicated with and  
17 what her location was at the time of the incident. I mean,  
18 that's something Bank of America specifically brings up, is  
19 they want to isolate her location. Well, certainly  
20 information that's already in Bank of America's possession,  
21 including both the online log-in history that was produced as  
22 part of discovery so far, and also her bank statements, show  
23 purchases being made during the time -- during the -- and  
24 around the relevant time period and show where she was, just  
25 as one example, and that's --

1           THE COURT: Well, but what about who she's  
2 communicating with? So if their theory is that she's in on  
3 this and they have some targets of who was in this ring, if  
4 she was communicating with them, then that would tend to show  
5 that she was involved.

6           MS. WEISSMAN: And Judge, as you brought up, if Bank  
7 of America has a phone number or something that they are  
8 interest -- they haven't turned that over to us, first of all,  
9 but you would be glad we have her phone records. If we are  
10 officers of the court, if they have a phone number or multiple  
11 phone numbers and they want to know whether or not those phone  
12 records -- those phone numbers, excuse me, appear on the phone  
13 records, that's something that we could certainly look at and  
14 attest to. If they do appear, we're happy to unredact the  
15 information regarding those particular phone numbers that Bank  
16 of America is interested in. I'm not sure what Mr. Despotakis  
17 means when he says that, "Well, we also just need to look at  
18 all of the phone records to see whether or not," -- I'm not  
19 even sure whether or not there's other phone numbers that  
20 they're not currently aware of that would somehow --

21           THE COURT: Well, it sounds --

22           MS. WEISSMAN: -- come to the fore --

23           THE COURT: -- like there are some other numbers  
24 that are on the bank's radar, but they -- it might be a long  
25 list, and so it doesn't make sense for them to turn that over

1 to you, but if they get your client's phone records and run it  
2 against their known list, they might get some hits. And once  
3 they get those hits, again, that would tend to show that she's  
4 communicating with -- I'll just call them for sake of brevity,  
5 known criminals. All right. I'm not making any judgment as  
6 to whether there's criminal behavior, but just a shorthand,  
7 right, so -- and then once they have those hits, if there are  
8 any, then they'll share it with you and then you'll have that  
9 information.

10 So the question is whether they should be entitled  
11 to do that. Again, since you've charged defamation, they are  
12 allowed to find out the truth. It's not limited to the  
13 investigation they did in real time in the past. They are now  
14 entitled to go forward and find out whether she was in fact  
15 linked to this criminal ring.

16 MS. WEISSMAN: That's true, although it would seem  
17 that they have to have some basis beyond pure conjecture --

18 THE COURT: Well, it doesn't sound like it's pure  
19 conjecture. They may not have shared it with you and so this  
20 will be the issue for Mr. Despotakis. Since you were  
21 requested to turn over information about the investigation,  
22 why have you not turned it over yet?

23 MR. DESPOTAKIS: You may recall, Your Honor, we kind  
24 of touched on this issue in the conference call we had  
25 previous to today on this. It's a bit of a conundrum, but it

1 may be solvable. Each side had submitted to Your Honor  
2 confidential settlement statements, which I won't go into in  
3 terms of contents or whatever. But the issue became how do we  
4 move forward to deal with any information that might have been  
5 there that we can disclose to plaintiffs counsel? I'm not  
6 adverse to providing that information to them, especially  
7 since one of the comments that Ms. Weissman made once again  
8 repeats a refrain that has been well known from the plaintiff.  
9 I'll leave it at that. There is a confidentiality order in  
10 place. If Your Honor will -- and it's been repeated in your  
11 papers, that particular refrain, but --

12 THE COURT: Well, I don't understand what you're  
13 talking about.

14 MR. DESPOTAKIS: It doesn't matter. If Your Honor  
15 would order it, I have no problem --

16 THE COURT: Well --

17 MR. DESPOTAKIS: -- it's subject to a  
18 confidentiality order.

19 THE COURT: Oh, okay. So the subs -- the  
20 confidentiality order is in place.

21 MR. DESPOTAKIS: Correct.

22 THE COURT: Okay. So I know you have concerns about  
23 tipping your hand --

24 MR. DESPOTAKIS: Right.

25 THE COURT: -- in terms of the security measures

1 that the bank takes, but you can't engage in a litigation by  
2 withholding information, right, so it is a conundrum for you.  
3 And a choice for your client is, you know, if you're engaging  
4 in this litigation, you have to turn over information --

5 MR. DESPOTAKIS: I will --

6 THE COURT: -- and if you don't want to turn over  
7 the information, you might have to figure out some other way  
8 to resolve this.

9 MR. DESPOTAKIS: My initial reaction to Your Honor  
10 and your statements is, I would be prepared to have a  
11 discussion at the end of the day with our client. I would  
12 strongly urge it, and I would need to get the client's  
13 authority, and I would be happy to give Eve or Brian a call by  
14 tomorrow.

15 THE COURT: Because I'm not going to grant your  
16 request in the absence of your turning information over to the  
17 plaintiff --

18 MR. DESPOTAKIS: I would hope I can --

19 THE COURT: -- because I don't think it's fair for  
20 you to just ask for their information and you not turn over  
21 your information.

22 MR. DESPOTAKIS: Well, we have given them  
23 substantial discovery responses.

24 THE COURT: No, but you haven't given them the basic  
25 core of the investigation that your client performed, and that

1 is the core of this case, whether it was reasonable, and they  
2 cannot assess whether it was reasonable --

3 MR. DESPOTAKIS: Well --

4 THE COURT: -- and they can't refute your defense  
5 that it was reasonable unless they can see it.

6 MR. DESPOTAKIS: -- we have given responses,  
7 including I think internal communications, commit notes, and  
8 certain other transactional information we have. There is one  
9 piece that created the conundrum.

10 THE COURT: Well --

11 MR. DESPOTAKIS: And I can commit to recommend it to  
12 the client and we can resolve this by Friday and report back  
13 to Your Honor once I speak to the client tomorrow --

14 THE COURT: So --

15 MR. DESPOTAKIS: -- but be prepared to recommend it,  
16 but it doesn't impact on I think some of the issues that we  
17 discussed --

18 THE COURT: But your known phone numbers, for  
19 example, you haven't turned over.

20 MR. DESPOTAKIS: Well, again, that was not part of  
21 any discovery demand that I'm aware of.

22 THE COURT: Well --

23 MR. DESPOTAKIS: The bank has its standard security  
24 procedures.

25 THE COURT: But if they had a hit, right, if they



1     figured out that a phone number on this case --

2                 MR. DESPOTAKIS:  No, no, no, you're  
3     misunderstanding, Your Honor --

4                 THE COURT:  Okay.

5                 MR. DESPOTAKIS:  -- if I may?  Okay.  They don't  
6     have a hit.  They have the numbers, but for them to determine  
7     whether those numbers match up to any communications made by  
8     plaintiff, we need that information.  We're not suggesting --

9                 THE COURT:  Okay.  So that wasn't part of the  
10    investigation?

11                MR. DESPOTAKIS:  Yeah, that was not revealed by the  
12    limited phone records for a month or so, redacted, that was  
13    provided to us.  That's -- the bank knows from its dealings in  
14    other matters and whatever it's doing, but it needs to match  
15    its knowledge institutionally to what might be revealed in  
16    these phone records.  That's my point.

17                THE COURT:  So it's possible for your -- from your  
18    perspective that you get the full phone records and there's no  
19    hit at all?

20                MR. DESPOTAKIS:  Correct, but we won't know that  
21    until we get them.  And on the issue of the Android phone, if  
22    I may briefly, to use that Android device the user would have  
23    had to have the raw password and online banking data that  
24    belongs to Ms. Ruane, so it comes full circle back to her.  
25    The issue about -- I respect what you said, you're officers of

1 the court, but there's nothing that obligates me, with all due  
2 respect to counsel, to take their word for anything --

3 THE COURT: Well --

4 MR. DESPOTAKIS: -- just as they are not taking my  
5 word for a lot of stuff.

6 THE COURT: -- right, I appreciate that, but I think  
7 part of it is what the bank knew. And so what it sounds like  
8 to me, since I don't know what the investigation entailed, it  
9 sounds to me like the bank knows where the transaction on the  
10 bank website occurred or the -- through the phone app, the  
11 bank app, or somehow you know that there's this Android  
12 device --

13 MR. DESPOTAKIS: Yes, yes,

14 THE COURT: -- that engaged in this transaction.

15 MR. DESPOTAKIS: And that's in the records, yes.

16 THE COURT: And your understanding is in order to --  
17 and that Android device -- do you know whether it belongs to  
18 the plaintiff? You don't know?

19 MR. DESPOTAKIS: We only know that for that device  
20 to have been used in the manner it was used, the plaintiff's  
21 password, online banking credentials, they all would have had  
22 to been known to that user.

23 THE COURT: Okay. So then it would be important to  
24 you to know whether the plaintiff -- whether that's her phone  
25 or someone else's phone --

1 MR. DESPOTAKIS: Right, and --

2 THE COURT: -- because if it's someone else's phone,  
3 then you could -- you know, maybe there's some information --  
4 that they stole her information and used their own phone.

5 MR. DESPOTAKIS: Well, we'll be able to identify, or  
6 the bank would be able to identify what that phone matches to,  
7 what part of the world --

8 THE COURT: Yeah.

9 MR. DESPOTAKIS: -- and there are known hotbeds of  
10 fraud where these things emanate from.

11 THE COURT: Okay.

12 MR. DESPOTAKIS: On the issue of location of the  
13 plaintiff when these transactions occurred, these are image  
14 deposits. They could be done anywhere, from anywhere. These  
15 were not deposits that were walked into the bank. They were  
16 just on the internet through the Android --

17 THE COURT: You take a picture of it --

18 MR. DESPOTAKIS: -- electronically --

19 THE COURT: -- on the bank -- on the --

20 MR. DESPOTAKIS: -- in they went. Right.

21 THE COURT: But when you take a picture of the  
22 bank -- of the check, the picture presumably has a location  
23 stamp on it?

24 MR. DESPOTAKIS: It may, but the point I'm making is  
25 these could be done from anywhere.

1 THE COURT: But you -- do you have a location stamp?  
2 Has that --

3 MR. DESPOTAKIS: I do not know. I do not know if  
4 there was one on there. Whatever the checks have on them,  
5 they have copies of the checks.

6 THE COURT: No, no, not the checks.

7 MR. DESPOTAKIS: We have copies of the checks.

8 THE COURT: Not the checks themselves.

9 MR. DESPOTAKIS: The images themselves.

10 THE COURT: The images themselves that were then  
11 sent to the bank so the bank could credit the account.

12 MR. DESPOTAKIS: I think that's what we've provided.  
13 We provided the actual images.

14 THE COURT: It has a location on it?

15 MR. DESPOTAKIS: I don't recall what they have, but  
16 whatever information they have on them, they do.

17 THE COURT: Because it sounds to me like it would.  
18 That's why I'm asking.

19 MR. DESPOTAKIS: Yeah. They may very well have  
20 that, yeah.

21 THE COURT: If I take a picture with my phone, it  
22 usually says where it was, roughly.

23 MR. DESPOTAKIS: Yeah, it may. I just don't know  
24 standing here now whether it does.

25 THE COURT: Okay.

1 MR. DESPOTAKIS: But whatever format those copies --  
2 plaintiff had those copies so --

3 THE COURT: All right. So you -- so there's  
4 still -- you called it one piece of information, as far as the  
5 investigation, that has not been turned over and you need to  
6 talk to your client about turning it over.

7 MR. DESPOTAKIS: Yes, I will do that.

8 MS. WEISSMAN: Your Honor, may I just respond to a  
9 couple things? I'm honestly just a little bit perplexed. The  
10 question of the location was -- I only brought that up because  
11 it was something that Bank of America raised, that they needed  
12 to know her location. It sounds like maybe they don't need to  
13 know her location. That was one of the reasons they gave in  
14 their motion as to why they needed her phone records.

15 The Android device and the information that Bank of  
16 America has turned over regarding the Android device, nothing  
17 about that suggests on its face that she was connected or  
18 involved. Yes, the Android device used her online log-in  
19 information to access her account and commit the fraud, but we  
20 know there's all kinds of fraud that takes place. I think  
21 Your Honor took judicial notice of that during our first  
22 conference. So the mere fact that a phone, which seems to  
23 have an IP address in Chicago, when she was in California, was  
24 used to deposit these checks -- and I'm just having trouble  
25 understanding how Bank of America can use that fact to say

1 that this sort of supports their theory that she was involved  
2 and connected somehow to what happened.

3 THE COURT: Well, I think they're entitled, because  
4 they're now entitled to discover the truth. Okay? And so  
5 they're entitled to find out whether your client was involved,  
6 and this is a logical place to go, you know. You may not  
7 think it's connected, but I think the bar is pretty low,  
8 because you have put the truth of the matter in issue here.  
9 If you were talking just about the reasonableness of the  
10 investigation, you know, we would be focused on the  
11 investigation they did in the past, but because you've pled  
12 defamation, they are allowed now to get to the bottom of what  
13 happened and they're -- one way that they have suspected this  
14 may be -- may have transpired is that your client used her  
15 phone, and if not, then fine, but if so, they're entitled to  
16 look at it and they're entitled to see if that's the  
17 situation.

18 So unfortunately for you, I think they are entitled  
19 to get the devices and the information so they can look to see  
20 if it matches, first of all, in the Android, or any other  
21 transactions that they've had related to this account because  
22 of the fraud that you've alleged. Because if they can piece  
23 these things together and present to the jury that in fact  
24 Ms. Ruane was involved with a ring of criminals, then they get  
25 to win on the defamation. Now, they may not be able to, but

1 they're entitled to try, so I think you need to turn that  
2 over.

3 MS. WEISSMAN: And it seems in terms of the phone  
4 records themselves, perhaps so, but there seems that there  
5 should be some logical end point --

6 THE COURT: Yes.

7 MS. WEISSMAN: -- to the scope, and so to see --

8 THE COURT: That's why I asked.

9 MS. WEISSMAN: -- all of her emails and text  
10 messages for an entire year --

11 THE COURT: Well, I didn't understand that they were  
12 looking for the content. I think they're just looking for the  
13 addresses, right?

14 MS. WEISSMAN: Based on the subpoena that they  
15 initially planned to file and submit to her -- at least one of  
16 her phone providers, Sprint, they are looking -- and it  
17 sounded to me earlier that they are looking to ultimately get  
18 access to all of her email communications, her text messages,  
19 the --

20 THE COURT: Right, and so I would limit that,  
21 because based on what Mr. Despotakis told me, they're just  
22 trying to match the phone numbers and the email addresses, and  
23 so that would be the only thing relevant at this point. Now,  
24 if they get hits on -- and they're sharing that information  
25 with you that these are known criminals, and somehow your

1 client is having communications with them, then I think they  
2 would be entitled to look at those communications  
3 specifically, but not all her communications with family  
4 members and friends or whatever. But in the first instance, I  
5 think they are entitled to look at the phone numbers that  
6 she's communicated with and the email addresses that she's  
7 communicated with so that they can determine whether they  
8 match up with their known criminal list. Okay? So now let's  
9 move on to the ID of the banks. Okay?

10 MR. BROMBERG: Your Honor, if I may for one moment?

11 THE COURT: Yes.

12 MR. BROMBERG: It would seem that -- well, one  
13 thing -- well, first of all, it would seem that any subpoenas  
14 which they're allowed to issue should be made returnable  
15 either in my office or in Ms. Weissman's office, so that at  
16 the very least we can look at the responses to see whether  
17 they raised any issues as to confidentiality, privilege --

18 THE COURT: Well, there's -- why would there be  
19 confidentiality or privilege?

20 MR. BROMBERG: We don't --

21 THE COURT: It's not content.

22 MR. BROMBERG: No, the problem is they say that  
23 they're -- they --

24 THE COURT: Well, what I can do is have them propose  
25 the subpoena to me for my review before they send it out.



1 MR. BROMBERG: Okay. The other thing is, with  
2 respect to the proposal we made of possibly having the target  
3 phone numbers given to us and then we go through them and see  
4 whether there are any hits, that's very commonly done and --

5 THE COURT: I know, but it sounds like it's -- it  
6 does sound cumbersome, and maybe I can ask Mr. Despotakis to  
7 tell me how that would work. It's just as easy to have them  
8 run their list against your client's phone list, rather than  
9 have somebody take a list of -- I don't know, is it ten  
10 numbers, is it 100 numbers -- and check it against your  
11 client's list, so --

12 MR. BROMBERG: I mean, I certainly don't want the  
13 additional work, Your Honor. However, I do have concerns  
14 about, you know, calls to friends, calls to neighbors --

15 THE COURT: Right, but --

16 MR. BROMBERG: -- calls to babysitters. That's all  
17 in people's phone records.

18 THE COURT: Yes, I understand, but they're not  
19 getting content, so if what I'm being told, and I will take  
20 Mr. Despotakis's word for it, they're going to take your  
21 client's phone log and run it against a list of known numbers  
22 and then see if there are any hits, and that's all they're  
23 going to do with it in the first instance, then I don't see  
24 why they can't do that.

25 MR. BROMBERG: Would there be limitations to that

1 effect in the Court's order, something that they can't  
2 basically --

3 THE COURT: Well, we could --

4 MR. BROMBERG: -- start calling neighbors,  
5 friends --

6 THE COURT: Yes. Okay.

7 MR. BROMBERG: I do have concerns about that kind  
8 of --

9 THE COURT: Okay. If that's your concern, then  
10 fine, let's -- you know, we'll figure out a way to --

11 MR. BROMBERG: Okay.

12 THE COURT: -- circumscribe that.

13 MR. DESPOTAKIS: Your Honor, yeah, I mean, if there  
14 are hits, of course we can determine and talk about the next  
15 steps, obviously.

16 THE COURT: Right, but the concern is other than the  
17 hits, if you find a phone number that she's calling a lot,  
18 somebody might get curious and say, "Let's call that phone  
19 number," and it turns out to be a boyfriend or something like  
20 that, right? And so it just seems like a fair thing to say,  
21 because what you've told me is you're looking to see if the --

22 MR. DESPOTAKIS: Communications.

23 THE COURT: -- phone log matches your known criminal  
24 list, right?

25 MR. DESPOTAKIS: Right, and I would commit --

1 THE COURT: So if we limit it that way, it sounds  
2 like it should be fine.

3 MR. DESPOTAKIS: Yeah, and I can commit to do this,  
4 that once we reach -- if the bank determines that there's a  
5 pattern here and there's certain numbers that are critical to  
6 the continued discussion, we'll share those with the Court and  
7 with plaintiff's counsel and we can determine at that point  
8 what we need to do from there, because --

9 THE COURT: Right, but then you wouldn't be able to  
10 make use of the other phone numbers that were not a hit.

11 MR. DESPOTAKIS: That's correct, Your Honor.

12 THE COURT: Okay. So -- but that --

13 MR. DESPOTAKIS: And the importance to all of this  
14 is to get the pattern of communications --

15 THE COURT: Yes.

16 MR. DESPOTAKIS: -- to see what that gives us in the  
17 first instance --

18 THE COURT: I understand, but I think the parties  
19 can work out some agreement as to circumscribing your use of  
20 the phone. So in other words, I will authorize the subpoena  
21 to these -- well, I guess the first thing is to turn over --

22 MR. DESPOTAKIS: The identification.

23 THE COURT: -- yeah, the identification. And then  
24 the second phase, which I'm taking an extra step now because  
25 we're all here, is to say that your subpoena needs to be

1 circumscribed to just the phone log and the email list, rather  
2 than content, all right, so no content, and then you will  
3 commit to taking the log and running it against the bank's  
4 known criminal list --

5 MR. DESPOTAKIS: Right.

6 THE COURT: -- and then whatever hits there are you  
7 will share with plaintiffs and then you discuss what you're  
8 going to do with that. And beyond that you're not going to do  
9 anything else with the phone logs or email addresses that you  
10 get as a result of the subpoena, right?

11 MR. DESPOTAKIS: Perhaps Your Honor, with one  
12 proviso, except if we do see something that we need to verify  
13 and ask the plaintiff about, we would have the right to apply  
14 to the Court, you know, on notice to counsel --

15 THE COURT: Well, if you --

16 MR. DESPOTAKIS: -- as to why we think we need that  
17 other information that may not be a hit because --

18 THE COURT: Well, but then you will be talking with  
19 plaintiff's counsel --

20 MR. DESPOTAKIS: That's correct.

21 THE COURT: -- so that you can figure out if -- I  
22 mean, you'll see it, right? So if you see something that you  
23 think is weird, you can talk to plaintiff's counsel and you  
24 can have a discussion about whether that's something you can  
25 pursue --

1 MR. DESPOTAKIS: If I --

2 THE COURT: -- but you can't do it without talking  
3 to plaintiff's counsel.

4 MR. DESPOTAKIS: That's right. In the first  
5 instance we would do that, but here's the fine point, as Your  
6 Honor would understand once I say this. You know, yes, there  
7 will be one category of calls that the bank will match to see,  
8 "Okay, are these known to us from other fraud investigations,  
9 national or international?" But then if they see, for  
10 example, telephone -- let's go with telephone numbers or text  
11 messages or even email addresses that look that they're out of  
12 country or that look like they might be going to a hot spot of  
13 fraud that's known to the banks, whether it comes out of  
14 Taiwan, Romania, Ukraine, Nigeria, any of those countries that  
15 are known hot spots, we're going to wonder, what is she doing  
16 calling those numbers. Now, we're not about to pick up and  
17 call anybody, but we would like to have a method to bring that  
18 to counsel's attention and to the Court's, if need be, so that  
19 we can get at those further --

20 THE COURT: Well, so, but my point is, if you see  
21 something like that, you can pick up the phone and call  
22 plaintiff's counsel and have a discussion about it --

23 MR. DESPOTAKIS: Yeah.

24 THE COURT: -- and then you can jointly figure out  
25 what if anything you're going to do about it, and if you don't

1 come to an agreement then you can come to the Court. But I'm  
2 just saying that you can't do anything else with it, like pick  
3 up the phone or start doing some other investigation without  
4 checking with plaintiff's counsel first --

5 MR. DESPOTAKIS: That's fine, Your Honor.

6 THE COURT: -- because there may well be an innocent  
7 explanation and they need to have an opportunity to talk to  
8 their client about it.

9 MR. DESPOTAKIS: That's fine, Your Honor. And  
10 again, as to the subpoena, where the document should go, I  
11 think they should probably come to our office. I will be  
12 happy to give copies of those documents to plaintiff's  
13 counsel.

14 THE COURT: Well, they can go to both --

15 MR. DESPOTAKIS: They'll go to both --

16 THE COURT: -- offices --

17 MR. DESPOTAKIS: -- because they'll be listed on  
18 these, right.

19 THE COURT: -- simultaneously and we could --

20 MR. DESPOTAKIS: And we would submit those --

21 THE COURT: -- you could work that out.

22 MR. DESPOTAKIS: -- to Your Honor for approval  
23 before we --

24 THE COURT: The subpoenas.

25 MR. DESPOTAKIS: -- send them, if I understood you

1 correctly.

2 THE COURT: I don't need the results, just the  
3 subpoenas themselves so that --

4 MR. DESPOTAKIS: Very well.

5 THE COURT: -- everybody knows what's being asked  
6 for. Ms. Shin?

7 MS. SHIN: Your Honor, yes, I wanted to express our  
8 concern that, you know, it's one thing if BANA has provided us  
9 this information already and we could know that that's the  
10 known universe of information that they're seeking to check  
11 against our client's records, but I don't feel any reassurance  
12 from what's been discussed so far that they may not just take  
13 information that they discover in our client's records and add  
14 it to their list and say, "Oh, we saw these numbers and they  
15 looked suspicious to us for some reason as well." We have no  
16 reassurance that they are not going to just work within their  
17 known numbers, whatever known hot spots they allude to. They  
18 might just say, "Oh, well, this number, let's check this out  
19 too." We have no protection for our client against undue  
20 harassment --

21 THE COURT: So --

22 MS. SHIN: -- that they're not going to subject her  
23 friends, her family, to this kind of harassment.

24 THE COURT: Well, hold --

25 MS. SHIN: If they could provide, in some limited

1 way at least, the list of numbers or other kinds of  
2 information, which they have withheld from us. They  
3 supposedly refer to this in their *ex parte* settlement letter,  
4 but we have not seen an iota of that. If we could see that in  
5 some way so that we have some reassurance that they're not  
6 going to invent, after the fact, after they've seen our  
7 client's records, that, you know, some basis for saying, "Oh,  
8 we already knew about this, and so now we're going to say that  
9 her mom and her cousins and all of these other people she  
10 communicates with are part of this ring of fraudsters." It  
11 seems like we are exposing our client to just rampant exposure  
12 and just harassment.

13 THE COURT: Okay. So, Mr. Despotakis, how long is  
14 this list?

15 MR. DESPOTAKIS: Your Honor, as I said, whatever  
16 that list is, it is the subject of what the bank has from  
17 various fraud investigations --

18 THE COURT: I know, but --

19 MR. DESPOTAKIS: -- involving all kinds of matters.

20 THE COURT: I know, but it's --

21 MR. DESPOTAKIS: It's not about to reveal --

22 THE COURT: Wait.

23 MR. DESPOTAKIS: -- that information.

24 THE COURT: So did you hear what Ms. Shin just said?

25 MR. DESPOTAKIS: I did, and I think I addressed it



1 earlier when I said the reason we need these records is to  
2 determine whether there's a match, anything that the bank --

3 THE COURT: Right, but she's concerned --

4 MR. DESPOTAKIS: -- might already know, but --

5 THE COURT: -- that it's -- hold on.

6 MR. DESPOTAKIS: Yeah.

7 THE COURT: She's concerned that it's not a static  
8 list, right? So she's concerned that people will show up on  
9 the list because they show up on the phone log, okay, because  
10 if you already believe that she's part of a criminal ring  
11 and --

12 MR. DESPOTAKIS: Yeah.

13 THE COURT: -- you see phone numbers that are --  
14 that show up a lot you may say, therefore, those are part of  
15 the ring. And so what assurance is there that you have a  
16 static list, that's a list that you have as of today, let's  
17 say? Yeah.

18 MR. DESPOTAKIS: Yeah, there is a static list as of  
19 today within the bowels of the bank, you know, in their fraud  
20 areas, but the -- anything new that might be discovered, I  
21 thought I addressed it before, we would share that information  
22 before we reached out or made any calls --

23 THE COURT: Well, but --

24 MR. DESPOTAKIS: -- and then we see how we resolve  
25 it.

1           THE COURT:  -- so that's the question is, how do we  
2 assure that it's a static list as opposed to a list that  
3 has -- gets added to as a result of the phone logs being  
4 turned over?

5           MR. DESPOTAKIS:  Well, I think I can make the  
6 commitment on behalf of my client that that's not going to  
7 happen.  We have a list.  If anything does get added onto the  
8 bank's records as a result of the information produced here,  
9 that will certainly not -- we won't make the claim that we  
10 relied on that information.

11          THE COURT:  Right, but what reassurance, let's say  
12 from their discovery angle --

13          MR. DESPOTAKIS:  Yeah.

14          THE COURT:  -- what are the -- when the phone  
15 numbers are added to the list, is there a record of what date  
16 they were added?

17          MR. DESPOTAKIS:  Yeah, we can have the bank provide  
18 that if there are hits when they acquired that number -- when  
19 they acquired that information.  To me that's not an issue at  
20 all.

21          THE COURT:  Okay.  So if there's a hit then you'll  
22 get the date, and if the date is after the date that the  
23 subpoena --

24          MR. DESPOTAKIS:  Right.

25          THE COURT:  -- is responded to, then you'll know --

1 MR. DESPOTAKIS: Yeah, yeah.

2 THE COURT: -- that it was added.

3 MR. DESPOTAKIS: That information is easily put  
4 together --

5 THE COURT: Okay.

6 MR. DESPOTAKIS: -- I would think.

7 THE COURT: All right.

8 MS. WEISSMAN: Your Honor?

9 THE COURT: Yes?

10 MS. WEISSMAN: Just perhaps a final point on this;  
11 the time frame. So, you know, the cases that -- there's two  
12 common types of cases that come up with phone records. One is  
13 Fair Labor Standards Act cases where phone records are  
14 circumscribed to the period of time that the plaintiff was  
15 employed. Another common way in which these kinds of phone  
16 records might be turned over is in the context of car accident  
17 cases where the relevant time period is generally limited to  
18 often just a few hours before and after the accident.

19 So I suppose I'm just wondering, you know, how Bank  
20 of America has come up with this one year before and three  
21 months after. And it seems like a large time period, given  
22 that the fraud all happened on one specific day and nobody  
23 seems to dispute that. So I'm not sure -- you know, perhaps  
24 Bank of America has some basis, based on other fraud that  
25 they're aware of, but again nothing has been turned over to

1 sort of explain why a year before and three months after --

2 THE COURT: Okay.

3 MS. WEISSMAN: -- is appropriate.

4 MR. DESPOTAKIS: I can address that, Your Honor.

5 THE COURT: Yes.

6 MR. DESPOTAKIS: Again, based on the bank's  
7 institutional experience in its fraud investigations, again,  
8 dealing with these kinds of issues, other kinds of issues,  
9 these things don't happen overnight. These things -- the  
10 potential victim or cohort is identified very early on at some  
11 point in time. The fraud doesn't take place the very next day  
12 or the very next month. There's all kinds of cons out there.

13 And again, we had a much broader time period  
14 initially. We've narrowed it down to the year before because  
15 we think that's fairly -- it's a fairly good indicator. You  
16 know, Ms. Ruane had lived in several jurisdictions. There  
17 were other issues involving -- or there were other judgments  
18 against her. There were things going on out there. And I'm  
19 not saying it to categorize it one way or the other, but there  
20 were things going on out there.

21 And it seems to me, these things unfold over time.  
22 Sometimes the -- if Ms. Ruane was involved, we'll call her a  
23 cohort, a co-conspirator, whatever you want to call it for  
24 purposes of our argument only, it could have laid low for a  
25 while. This thing could have jelled. She could have said

1 "no" perhaps at first and then they prevailed on her. She  
2 could have come into financial difficulty and then succumbed  
3 to the lure of potentially quick money for doing nothing, so  
4 we don't know.

5 We reduced it to a significant period of time. It  
6 is a year and a couple of months afterwards, because remember  
7 what happened here. The checks were stopped. The proceeds  
8 never got into Ms. Ruane's account. So it is conceivable that  
9 the fraudsters at the other end could have been in  
10 communication with her and had been saying, "What happened  
11 here? We were supposed to get the money. You were supposed  
12 to get your cut. What do you mean, the banks -- the checks  
13 are stopped here? You reported these to the bank, you know,  
14 what's going on?"

15 So I think three months after is reasonable. If  
16 there were any follow-up conversations with the bad guys  
17 expressing their displeasure at the fact that the checks  
18 hadn't been cleared, and certainly within a year, if she was  
19 involved, I think that's a reasonable time period for anything  
20 like this to unfold. And again, there may be nothing found --

21 THE COURT: Okay.

22 MR. DESPOTAKIS: -- but we're entitled to see it, is  
23 the point.

24 THE COURT: I got it. So I think the year before  
25 and the three months after is reasonable for what's being

1 sought here, so for that, as we said before, I grant your  
2 motion to compel the information to identify the servers, the  
3 providers and the devices for a year and three months after --  
4 a year before and three months after, and then when you draft  
5 your subpoena to the providers, then you need to run it by the  
6 Court before you send it out. Okay?

7 MR. DESPOTAKIS: Yes, Your Honor.

8 THE COURT: So the second one is the banking  
9 relations -- relationships. Ms. Weissman, I don't know if  
10 you've had a chance to address that.

11 MS. WEISSMAN: Yeah, I don't believe we have. I  
12 mean, I think that's -- the arguments are certainly similar.  
13 For this one it seems just so clear that there are much less  
14 intrusive ways of obtaining this information. I mean, for one  
15 thing her consumer reports -- I mean, where the banks  
16 themselves report when there's this kind of activity are  
17 readily available and available to Bank of America, so --

18 THE COURT: Well, but sometimes things get lost or  
19 they don't get reported for some reason, so why shouldn't they  
20 be entitled to just find out what banks your client had  
21 accounts at and then they can issue a subpoena to get  
22 information about similar claims and then also the monthly  
23 account statements -- or monthly account balances?

24 MS. WEISSMAN: Your Honor, again, there's -- as we  
25 sort of keep coming back to and I don't want to be repetitive,

1 there's no foundation. There's no reasonable basis or  
2 information that's been provided, at least with the bank's --  
3 with -- I'm sorry, with the phone records, it sounds like  
4 there are phone numbers that can be compared and that the bank  
5 is at least claiming that they have some reason to think that  
6 there are phone numbers that could show up there.

7 THE COURT: But again, they're allowed to find out  
8 whether in fact your client was involved in a criminal ring,  
9 and so to find out whether she has engaged in similar, let's  
10 just call it suspicious behavior with other banks would tend  
11 to show -- tend to prove their point.

12 MS. WEISSMAN: Your Honor, they asked as part of  
13 their discovery request whether or not she ever filed any  
14 similar claims with other banks. She responded --

15 THE COURT: Why can't they --

16 MS. WEISSMAN: -- you know that --

17 THE COURT: -- go behind her word and actually get  
18 the records to make sure that's true?

19 MS. WEISSMAN: Can you just --

20 THE COURT: That's part of discovery.

21 MS. WEISSMAN: Your Honor, can I just have a  
22 moment --

23 THE COURT: Yeah.

24 MS. WEISSMAN: -- to confer with my co-counsel?

25 [Pause in the proceedings.]

1 MS. WEISSMAN: Thank you, Your Honor. Your Honor,  
2 again, we would submit to the Court that this kind of  
3 information is intrusive. It is laying bare a low income  
4 person's entire --

5 THE COURT: Well, if she doesn't have any bank  
6 accounts -- other bank accounts, then there's nothing to lay  
7 bare.

8 MS. WEISSMAN: There could be many reasons also,  
9 Your Honor, why she might have certain balances or other  
10 balances in accounts. I mean, is the fact that maybe she is  
11 getting money from family, for example, is the fact that she  
12 has money in an account at one time or another going to be  
13 construed to say that she must have been involved in some kind  
14 of fraud because she suddenly -- you know, there's an uptick  
15 in the account balance? I mean --

16 THE COURT: Okay.

17 MS. WEISSMAN: -- we could argue --

18 THE COURT: Well, you can argue that either way, but  
19 they're entitled to have the information it sounds so they can  
20 at least make the argument. They're not -- it's not  
21 conclusive, of course.

22 MS. WEISSMAN: It certainly seems like  
23 information -- we would be willing to agree that -- for them  
24 to have information about whether or not there were  
25 complaints, similar complaints at other banks.



1 THE COURT: Okay.

2 MS. WEISSMAN: I think that we are okay with that.  
3 We think that the three-year time period is overly broad and  
4 it should be a similar --

5 THE COURT: I thought it was two years before and  
6 then one year after.

7 MS. WEISSMAN: Yeah.

8 THE COURT: Right, so that's the three years you're  
9 talking about.

10 MS. WEISSMAN: That's the three-year time period. I  
11 mean, if anything, perhaps a similar time period that was just  
12 agreed to on the phone records, but her --

13 THE COURT: Well, but the year after might be  
14 important, because you're saying that she was not able to open  
15 any bank account, so if in fact she did have open bank  
16 accounts, that would disprove your client's claim.

17 MS. WEISSMAN: Well, we said that she couldn't, yes,  
18 open bank accounts --

19 THE COURT: That's what I'm saying.

20 MS. WEISSMAN: -- for a certain period of time.

21 THE COURT: But if it turned out that she did --

22 MS. WEISSMAN: Yeah.

23 THE COURT: -- open bank accounts in the year after,  
24 then that would tend to disprove your client's claim.

25 MS. WEISSMAN: But so perhaps a year before and a

1 year after, in terms of -- Your Honor, the other thing is  
2 though, I mean, certainly information about her statements, it  
3 sounds like that's off the table. We would be very concerned  
4 about that --

5 THE COURT: Yes.

6 MS. WEISSMAN: -- being relevant and being overly --

7 THE COURT: Right, and so I think --

8 MS. WEISSMAN: -- intrusive and broad.

9 THE COURT: -- I heard Mr. Despotakis say that he's  
10 modified the request so that it would just be the monthly  
11 account balances so he can look at during this three-year  
12 period where her account balances were, because when people  
13 talk about -- I guess your client has said that she had an  
14 inability to support her family because she lost her job and  
15 she had to move back to New York and had to borrow money, that  
16 that would tend to show -- you know, would be another way --  
17 another piece of the puzzle in addition to the income loss.

18 So in other words, people can lose their income but  
19 still have savings and that is a cushion against financial  
20 ruin. But you've basically pled financial ruin here, and so I  
21 think they would be entitled to find out whether that's the  
22 case. And if there is money in the accounts and your client  
23 can explain that it's through loans or whatever, then, sure,  
24 you're entitled to do that, but I think it sounds like they're  
25 also entitled to find out if there's support for your claim of

1 financial ruin, so --

2 MS. WEISSMAN: So, Your Honor, would the Court also  
3 be amenable to reviewing the subpoenas in this case as well to  
4 make sure that they're truly limited --

5 THE COURT: Yes.

6 MS. WEISSMAN: -- to just learning whether there are  
7 similar types of claims of fraud and whether there's -- and to  
8 the account balances and no other account information?

9 THE COURT: Yes.

10 MS. WEISSMAN: Okay.

11 MR. DESPOTAKIS: Your Honor, if I may?

12 THE COURT: Yes.

13 MR. DESPOTAKIS: On the account balances, for the  
14 sake of clarity, yes, you're right, we don't want to see the  
15 individual transactions, but typically in a bank statement  
16 there's a recap section in the front that tells you total  
17 amount of deposits, total amount of withdrawals or debits,  
18 service fees, interest earned, and then your closing balance  
19 for that month. We would want that raw -- gross information,  
20 not just the line that says the balance, because --

21 THE COURT: So the total debit and the total --

22 MR. DESPOTAKIS: Right, because in any given month  
23 it is conceivable, and I have seen this, you get X-number of  
24 dollars going in, you get X-number of dollars going out, but  
25 your balance could be zero in June --

1 THE COURT: Yeah.

2 MR. DESPOTAKIS: -- and still be zero in July --

3 THE COURT: Okay. So it would be --

4 MR. DESPOTAKIS: -- because your ending balance  
5 won't be -- right.

6 THE COURT: Yeah, it would be the balance plus the  
7 total debits and total deposits.

8 MR. DESPOTAKIS: Total debits, total credits,  
9 balance, not individual transactions. It's a place to start.

10 THE COURT: Okay. But not individual transactions?

11 MR. DESPOTAKIS: Correct, just the --

12 THE COURT: Okay.

13 MR. DESPOTAKIS: -- total gross numbers.

14 THE COURT: All right. Because the monthly number  
15 doesn't capture what happened --

16 MR. DESPOTAKIS: Within the month.

17 THE COURT: -- within the month. All right. So if  
18 it turned out, and it may not be an issue because if your  
19 client has no money or very limited money, then there -- the  
20 account statements and the activity in her accounts will  
21 presumably show that. So if, for example, there's a 10,000  
22 deposit -- \$10,000 deposit on the second day of the monthly  
23 cycle, and then a \$10,000 withdrawal on day 20, it wouldn't  
24 show up in the monthly balance at the end of the month, but it  
25 would show up that somehow a large amount of money got moved

1 during the course of the month.

2 MS. WEISSMAN: Yeah. I mean, it just -- it seems  
3 like, you know, if she wasn't a low income person, this  
4 information wouldn't --

5 THE COURT: It's -- no, I think --

6 MS. WEISSMAN: -- there would be no basis for this,  
7 but --

8 THE COURT: Well, but you pled it, right? You pled  
9 financial ruin. If you didn't plead it, I don't know that  
10 they -- it would matter, but you pled it, and you pled that  
11 because of what the bank did all these horrible things  
12 happened, and they may well have happened. But you said in  
13 addition to her not being able to open a bank account, that  
14 she no longer had income, that she wasn't able to support her  
15 family, which meant she had to move, which meant she had to,  
16 you know, lose her house or, you know, whatever those things  
17 are, and once you plead that they're entitled to disprove it,  
18 so that's where you are. Okay?

19 MS. WEISSMAN: Yeah. I mean, we have submitted in  
20 discovery as far as pay stubs and information about her  
21 widow's pension and information --

22 THE COURT: But that doesn't show --

23 MS. WEISSMAN: -- about her job application.

24 THE COURT: But that's just, you know, employment  
25 and pension, but if their theory is that she's involved in a

1 criminal ring and the criminal ring is giving her money for  
2 work that she's done for them, but it's not showing up on a  
3 pay stub, obviously, then they're entitled to get that,  
4 because that does support their theory. Now, if there isn't  
5 anything there or there's an innocent explanation, then that's  
6 part of the discovery process and part of what the trial will  
7 be.

8 MS. WEISSMAN: Sure. It just -- theory seems so  
9 threadbare, given that she re -- why would she have  
10 reported --

11 THE COURT: But it doesn't --

12 MS. WEISSMAN: -- the fraud in the first place --

13 THE COURT: Well, it --

14 MS. WEISSMAN: -- if she was involved in a seasoned  
15 criminal --

16 THE COURT: But if that's the case, then we don't  
17 even need to go to trial and you should move for summary  
18 judgment, right? I mean, there are issue in dispute here, and  
19 so that's why during the course of discovery both sides are  
20 entitled to get the information so they can make their case.  
21 Okay? But you've pled defamation, so they're entitled to find  
22 out the truth of the matter. You've pled financial ruin, so  
23 they're entitled to find out whether that's true, and so  
24 that's why I'm going to grant that. Okay?

25 MS. WEISSMAN: Okay, Your Honor. Well, then I would

1 just say for the third and final --

2 MR. BROMBERG: Your Honor, if I may, for a moment?  
3 There is a concern here that I've subpoenaed records from  
4 banks before. They are not particularly selective. Even  
5 though Bank of America's attorneys are going to ask -- may ask  
6 for, you know, just the gross debits and deposits, I can  
7 guarantee you that the banks are going to turn over the whole  
8 monthly statements.

9 THE COURT: Well, then we should put something in  
10 the subpoena to say, "You shall not disclose this part."

11 MR. BROMBERG: They're going to do it anyway.

12 THE COURT: Well --

13 MR. BROMBERG: I mean, if it -- I would prefer to  
14 have it come to one of our offices first and then we can  
15 redact everything --

16 THE COURT: Well, you can --

17 MR. BROMBERG: -- but the summary section.

18 THE COURT: -- put that in the subpoena and I can  
19 court order it so that if they disclose it they will be in  
20 violation of a court order. Okay?

21 MR. DESPOTAKIS: Your Honor, may I --

22 THE COURT: Yes.

23 MR. DESPOTAKIS: -- address those two concerns? I  
24 don't know what banks Brian is talking about, but I know how  
25 it works with Bank of America and most money center banks.

1 They do not respond beyond it for a very simple reason. Under  
2 15 U.S.C. 6801, *et seq.*, that's the federal financial  
3 confidential -- Financial Privacy Act, the Gram -- whatever it  
4 is --

5 MR. BROMBERG: Gram-Leach-Bliley.

6 MR. DESPOTAKIS: Thank you. Okay. They would be in  
7 severe regulatory and legal heap of trouble if they  
8 disregarded it and gratuitously released information not  
9 covered by the specific terms of the subpoena. We will craft  
10 the subpoena exactly as I have indicated it, and I know most  
11 banks -- and if I get something that is beyond the scope of  
12 that, I will commit -- since it will be coming to me, I will  
13 commit that I will promptly advise plaintiff's counsel and  
14 return whatever excess pages I receive. But we will craft the  
15 subpoena very, very succinctly. We will make it clear what it  
16 is that we want.

17 THE COURT: Well, you should also make it clear what  
18 you don't want.

19 MR. DESPOTAKIS: That's correct.

20 THE COURT: Yeah.

21 MR. DESPOTAKIS: Right. And I will commit to do  
22 that. We will craft it carefully and we'll cover the concerns  
23 expressed by --

24 THE COURT: And then you again --

25 MR. DESPOTAKIS: -- plaintiff's counsel.



1 THE COURT: -- submit it to plaintiff's counsel and  
2 the Court so that we can look at it.

3 MR. DESPOTAKIS: Absolutely, no problem.

4 THE CLERK: All right. So the final point is tax  
5 returns.

6 MS. WEISSMAN: The final point is the tax returns.  
7 Your Honor, given the other information Bank of America is now  
8 going to have access to, I really can't see any basis why they  
9 would also need five years' worth of her tax returns. I mean,  
10 certainly if the information that's going to now be provided  
11 starts to produce some kind of leads to support these kinds of  
12 allegations, that so far have been unsupported, then perhaps  
13 we could return to the conversation. But I mean, to show her  
14 income they're going to have access to now all of her banking  
15 institutions to show her potential communication or contact  
16 with a fraud ring; they're going to have access to her phone  
17 records.

18 I'm left with not seeing any basis for why the tax  
19 returns at this stage could be proper, and courts have  
20 submitted tax returns to a higher level, a more stringent  
21 level of scrutiny, you know, because there's a public policy  
22 incentive to make sure that people file accurate returns, and  
23 they're not readily required to be turned over as part of  
24 discovery.

25 THE COURT: Right. Well, so you've also pled as

1 part of the damages, loss of income, and so whether there is  
2 in fact a loss of income is something that the tax return  
3 could show. And it sounds from what Mr. Despotakis said  
4 earlier, they're looking for only two things: one is the  
5 income and the other is reported losses. So the income, since  
6 you pled it, I think it's fair for them to get, at least the  
7 income line.

8 MS. WEISSMAN: So we could redact the tax returns  
9 other than the income line?

10 THE COURT: Right. And then the losses, if she  
11 had -- I don't know whether she would do this, but whether she  
12 would report losses related to fraud that was perpetrated on  
13 her or reported to be perpetrated against her in other  
14 instances, so that -- I recognize that the information that  
15 I've asked to be turned over, in terms of complaints to other  
16 banks, may be relevant to that point, but if in addition to or  
17 outside of any reports of the banks, she's reporting to the  
18 IRS that she had losses because of fraud, that would also be  
19 relevant to whether in fact she was involved in a criminal  
20 ring.

21 MS. WEISSMAN: Your Honor, if we're to turn over  
22 redacted tax returns, other than her income and, I mean, any  
23 reported losses due to fraud, I think that that's -- I just  
24 want to confer with my co-counsel before I say that we're okay  
25 with that, but -- sorry, Your Honor, one moment.

1 THE COURT: That's okay.

2 [Pause in the proceedings.]

3 MS. WEISSMAN: So, Your Honor, the one other caveat  
4 we would have is that going back five years seems unduly far.  
5 I mean, perhaps three years would be more reasonable and we  
6 could provide that information, again, the income line and any  
7 reporting of losses due to fraud.

8 THE COURT: Okay. Thank you. Mr. Despotakis?

9 MR. DESPOTAKIS: Since counsel is agreeing, subject  
10 to a reduced period, I was just going to point out that, you  
11 know, there could be inconsistencies. If our theory of the  
12 case is correct and Ms. Ruane was involved, she could be  
13 reporting one thing to IRS and in the meantime there's an  
14 inconsistency in the bank statements in terms of balances that  
15 would also go to the issue of her credibility, her damages,  
16 and everything else, that would be equally fair game.

17 THE COURT: Right. And so the time period will be  
18 similar. So it's three years, not five years, if you want to  
19 look at that.

20 MR. DESPOTAKIS: That's fine, Your Honor.

21 THE COURT: Yes. Okay.

22 MR. DESPOTAKIS: We would agree to that.

23 THE COURT: So it'll be tax returns going back three  
24 years. Are you say -- so it wasn't clear to me if the request  
25 is five years prior to the incident or prior years -- five

1 years from today.

2 MR. DESPOTAKIS: No, prior to the incident.

3 THE COURT: Prior to the incident.

4 MR. DESPOTAKIS: That has to be our ground zero  
5 reference point, Your Honor.

6 THE COURT: Okay.

7 MS. WEISSMAN: So, Your Honor, we just wanted to  
8 clarify two points that have come up in the course of this  
9 discussion. And one is to just understand when the *ex parte*  
10 information is going to be turned over, when that decision is  
11 going to be made, and whether any of the rulings today or  
12 decisions today are contingent on that. And the second is  
13 just to clarify this question about whether or not they have a  
14 static list and how we will ensure a static list.

15 I understand -- we talked about the fact that there  
16 perhaps would be some kind of time stamp. Would that come  
17 with some -- I think we would just want to make sure that  
18 there's something to verify that it is an authenticated  
19 business record, you know, that the time stamp is somehow part  
20 of their normal course and process and it's not something  
21 that's put on there just for the purpose of this litigation,  
22 but that there is in fact a process in place, and what is that  
23 procedure, what is that process to date when these phone  
24 numbers appear in their records.

25 MR. DESPOTAKIS: Your Honor, I have to say something

1 at this point. What's being suggested is that the bank would  
2 be in effect altering records, creating false and fraudulent  
3 records --

4 THE COURT: Well, I don't think that's -- I don't  
5 think --

6 MR. DESPOTAKIS: What I'm saying -- I want to dispel  
7 that.

8 THE COURT: Wait -- no, but I don't think that's  
9 being said, so I don't think that --

10 MR. DESPOTAKIS: That's what I'm hearing, though.

11 THE COURT: Well, I didn't hear that --

12 MR. DESPOTAKIS: All right.

13 THE COURT: -- so let me clarify. So all they're  
14 saying is they want to make sure that there aren't -- that  
15 there's -- because if there's -- with electronic records it's  
16 often tricky because it's not static, right, so things are  
17 constantly changing.

18 MR. DESPOTAKIS: Correct.

19 THE COURT: And unless there's a way to re-trace the  
20 steps to say when things changed, then it's hard to say  
21 whether something was on the list prior or added later. Okay?

22 MR. DESPOTAKIS: And I've committed --

23 THE COURT: And so --

24 MR. DESPOTAKIS: -- to provide that information.

25 THE COURT: Right, so that's an outstanding issue is

1 just for you to confirm, because it didn't sound like you knew  
2 100 percent that there was a time stamp on the list.

3 MR. DESPOTAKIS: Right.

4 THE COURT: Okay.

5 MR. DESPOTAKIS: And I would be happy to confirm  
6 that.

7 THE COURT: Okay.

8 MR. DESPOTAKIS: I will get the bank's confirmation  
9 and I as counsel will relay that to plaintiff.

10 THE COURT: Okay. So --

11 MR. DESPOTAKIS: I had no problem with that earlier.

12 THE COURT: All right, all right. So then --

13 MR. DESPOTAKIS: One more thing, if I may, Your  
14 Honor, just to be clear?

15 THE COURT: And then the other part was about  
16 turning over -- you said you had to talk to your client about  
17 the one piece of missing information.

18 MR. DESPOTAKIS: The one piece that created --

19 THE COURT: So when are you going --

20 MR. DESPOTAKIS: -- the conundrum last time, yes.

21 THE COURT: Yes. And so when are you going to be  
22 able to --

23 MR. DESPOTAKIS: I will commit to have that  
24 discussion with my client tomorrow --

25 THE COURT: All right.

1 MR. DESPOTAKIS: -- and I will get back to  
2 Mr. Bromberg or to Eve or to Susan no later than Monday.

3 THE COURT: Okay. And so I will hold off on  
4 enforcing this until Tuesday so that if there's a problem with  
5 the information, if your client balks or you can't reach an  
6 agreement with the plaintiff as to what you're turning over,  
7 that I will look at what I've ruled on today to see if it's  
8 still relevant.

9 MR. DESPOTAKIS: Yeah, Your Honor, if I may, as to  
10 the tax return issue, we would be asking for three years  
11 before on the tax returns and one year afterwards, because,  
12 again, as she was saying that she was destitute, she's put her  
13 financial condition into direct dispute, so we want to know  
14 what she reported the subsequent year as well --

15 THE CLERK: All right, so --

16 MR. DESPOTAKIS: -- if that's reasonable, because  
17 this all happened I believe --

18 THE COURT: -- the three years before and one year  
19 after.

20 MR. DESPOTAKIS: After the date of the incident,  
21 yeah, for the next applicable tax returns.

22 THE COURT: Can we just give the tax years so that  
23 we don't have a problem? What tax years are we talking about?

24 MS. WEISSMAN: Your Honor, the tax years that are  
25 requested go through 2017, so my understanding was if we were

1 doing three years it was 2015, 2016, and 2017.

2 MR. DESPOTAKIS: Right, because this incident  
3 happened when, September seven --

4 MS. WEISSMAN: So that's the -- it happened in 2016,  
5 so that's the year before --

6 MR. DESPOTAKIS: 2016, so it would be tax year --

7 MS. WEISSMAN: -- the year of, and the year after.

8 THE COURT: Wait, don't talk over each other. So if  
9 you're saying this happened in 2016, so it would be -- 2017  
10 would be the year after --

11 MR. DESPOTAKIS: Right.

12 THE COURT: -- and then the -- it would be 2014, '15  
13 and '16, right?

14 MR. DESPOTAKIS: Yes, yes.

15 THE COURT: Okay. So it was --

16 MR. DESPOTAKIS: I think we agree on the years.

17 THE COURT: -- 2014, 2015, 2016, 2017. Those are  
18 the years.

19 MS. WEISSMAN: Yeah, I thought we said the same  
20 years as the bank statements, so two years before and one year  
21 after. I'm not sure why they're now saying three years before  
22 for this.

23 THE COURT: 2016 -- well, 2016 is when it's  
24 happening --

25 MS. WEISSMAN: It happened towards the end of the



1 year.

2 THE COURT: -- so technically -- yeah.

3 MS. WEISSMAN: Yeah.

4 THE COURT: So I think it's fair to just say 2014  
5 and 2015, and then 2016 and 2017.

6 MS. WEISSMAN: Okay.

7 THE COURT: Okay.

8 MS. WEISSMAN: And then just to clarify that our  
9 turning over the information about the phone internet provider  
10 is contingent on first receiving this information from Bank of  
11 America about the process and confirming that there's this  
12 process in place and what that process is to ensure this  
13 static universe.

14 THE COURT: Yes, but they don't have to turn over  
15 the phone numbers, their phone number list --

16 MS. WEISSMAN: I understand.

17 THE COURT: -- just so that when you get the list of  
18 hits, you would be able to confirm that those phone numbers  
19 were already on the list and not added as a result of what  
20 you've turned over.

21 MS. WEISSMAN: But something in writing that just  
22 describes the fact that there is a process in place to ensure  
23 that those numbers are dated in some way.

24 MR. DESPOTAKIS: I've already committed to do that,  
25 so --

1 THE COURT: Yes.

2 MS. WEISSMAN: Okay.

3 THE COURT: Okay.

4 MR. DESPOTAKIS: -- twice.

5 THE COURT: All right. So --

6 MR. BROMBERG: If I may, Your Honor? Is there  
7 actually a physical list in defense counsel's possession?

8 MR. DESPOTAKIS: No.

9 THE COURT: Well --

10 MR. BROMBERG: Okay.

11 THE COURT: -- it's -- when you say "physical list,"  
12 we're in an electronic world, so what do you mean?

13 MR. BROMBERG: Well, whether it be -- in some fixed  
14 form, whether it be a file -- an Excel spreadsheet,  
15 something --

16 THE COURT: Well --

17 MR. BROMBERG: -- with this list so we can ensure  
18 that there's --

19 THE COURT: Well, but --

20 MR. BROMBERG: -- you know, that we know what it is  
21 now.

22 THE COURT: Well, the problem is these things are  
23 happening in real time, right, and so it's -- the only -- and  
24 it doesn't really matter when they're added, it just -- you  
25 just need to know that it wasn't added after you turned over --

1 after the phone company turned over the list to check against,  
2 right?

3 MR. DESPOTAKIS: And --

4 MR. BROMBERG: But I'm just wondering if there's any  
5 need for any -- if we have a need for verification later on, if  
6 there's something we can go back to.

7 THE COURT: Verification of what?

8 MR. BROMBERG: Verification that nothing's been  
9 added if --

10 THE COURT: Right, that's what we're talking about,  
11 and so --

12 MR. BROMBERG: What I'm saying is, it might help if  
13 defense counsel actually has an Excel spreadsheet with all  
14 these numbers sitting in there --

15 THE COURT: But nobody has Excel spreadsheets  
16 anymore. It's --

17 MR. BROMBERG: Well, no, you can --

18 THE COURT: -- a database.

19 MR. BROMBERG: -- output all this -- but you can  
20 output a list to an Excel spreadsheet or to an ASCII delimited  
21 file, whatever. It can be some --

22 THE COURT: Okay. So what you want to do is to  
23 create something static out of --

24 MR. BROMBERG: Let's create something static so that  
25 in the event there's ever any dispute --

1 MR. DESPOTAKIS: Yeah, and --

2 MR. BROMBERG: -- down the line about when something  
3 got added --

4 THE COURT: Okay. No --

5 MR. BROMBERG: -- we can go back to a static record.

6 THE COURT: -- that's fair. So is there --

7 MR. DESPOTAKIS: I have a problem with that, though,  
8 Your Honor --

9 THE COURT: Why?

10 MR. DESPOTAKIS: -- if I may be heard? Okay. As I  
11 said, this is institutionally within Bank of America, and it  
12 deals with a lot of different frauds around the world, around  
13 the country constantly. So these numbers I assume are there  
14 and they're known institutionally to the fraud investigators,  
15 but that is proprietary. It is revealing --

16 THE COURT: No, wait, wait, wait, wait.

17 MR. DESPOTAKIS: -- security information.

18 THE COURT: I hear you on that --

19 MR. DESPOTAKIS: Right.

20 THE COURT: -- but the question isn't about you  
21 giving them the phone numbers -- all your phone numbers. I've  
22 already said you don't have to turn that over.

23 MR. DESPOTAKIS: Okay.

24 THE COURT: Okay? What I am saying is, once you get  
25 the hits, they want to be able to go back and say, "Did you add

1 this phone number just because you got it from my client?"

2 MR. DESPOTAKIS: Okay, and I've committed to do  
3 that.

4 THE COURT: So if -- but the proposal from  
5 Mr. Bromberg is that you -- that your client creates -- it's a  
6 non-static list, but if there's a way to freeze it in time so  
7 that there's a record of it, okay, so that later on if there's  
8 a question as to, was it on the list before or was it on the  
9 list afterwards, you can go back and check. Now, that may not  
10 work, but it's a good suggestion, right, to have some way to  
11 download that information and put it in a list someplace, but  
12 it someplace to hold for now, so that that's the list you're  
13 going to check against or that you're --

14 MR. DESPOTAKIS: All right. Okay.

15 THE COURT: -- checking against the non-static list,  
16 but if it's not on that static list, that a question will be  
17 raised. Now, we're not saying you have to create the static  
18 list today, right?

19 MR. DESPOTAKIS: Yeah.

20 THE COURT: It may be that you create the static  
21 list an hour before you run it against the information that  
22 you've got --

23 MR. DESPOTAKIS: I understand.

24 THE COURT: -- right, or an hour before the return  
25 is received, you see what I'm saying --

1 MR. DESPOTAKIS: I understand.

2 THE COURT: -- so that there's no way that you could  
3 have -- your client could have messed with that list by adding  
4 a number that wasn't on it.

5 MR. DESPOTAKIS: Right, because we certainly can't  
6 do anything prior to receiving the information of the providers  
7 and receiving the names and receiving the --

8 THE COURT: Correct.

9 MR. DESPOTAKIS: Okay.

10 THE COURT: So if there's a way --

11 MR. DESPOTAKIS: That's fine.

12 THE COURT: -- to create a static list and just put  
13 it in a vault --

14 MR. DESPOTAKIS: I --

15 THE COURT: -- so that everybody can be sure of  
16 that. Now, I understand your client is very concerned about  
17 revealing that list, and so it doesn't sound like you want that  
18 list, per se, right?

19 MS. WEISSMAN: Actually --

20 THE COURT: You just want to -- well, I know you  
21 want it, but I don't know that you necessarily -- I haven't  
22 ruled that you should get it and I'm -- maybe I should talk  
23 through all that right now, because if the list is of all known  
24 criminals and they're saying they don't think they should have  
25 to give it to you because it has nothing to do with your

1 client, that might be --

2 MR. DESPOTAKIS: Just the hits, Your Honor.

3 THE COURT: -- that --

4 MR. DESPOTAKIS: Just the hits.

5 THE COURT: -- may be an issue, right? So if  
6 they've got a list of 1,000 known criminals that they're  
7 worried about, they're concerned about giving you that list if  
8 it has nothing to do with your client, right?

9 MR. BROMBERG: Your Honor, ideally we want it  
10 deposited with the Court, but frankly if defense counsel has --  
11 keeps it on his computer in some kind of locked form with a  
12 date stamp, we're fine.

13 THE COURT: Okay. All right. Okay. Because I know  
14 you're concerned about creating a document that you later  
15 will --

16 MR. DESPOTAKIS: Doesn't exist.

17 THE COURT: -- have to turn it over in discovery --

18 MR. DESPOTAKIS: Right.

19 THE COURT: -- so that's why I'm talking through  
20 this.

21 MR. DESPOTAKIS: And I will discuss this issue with  
22 the client, too, and find out if it's capable or they can  
23 gather their information and put it into a newly created list  
24 and --

25 THE COURT: Right, that's static for purposes --

1 MR. DESPOTAKIS: Static, and they would send it to  
2 me.

3 THE COURT: -- of establishing that it hasn't been  
4 added to as a result of the plaintiff's disclosure.

5 MR. DESPOTAKIS: I understand.

6 THE COURT: All right.

7 MR. DESPOTAKIS: Yeah, that's fine.

8 THE COURT: Okay. So I think I've dealt with the  
9 defendant's motion to compel. I should turn now to the  
10 plaintiff's motion.

11 All right. So, Ms. Weissman?

12 MS. WEISSMAN: Yes, Your Honor, thanks. So we're  
13 seeking three broad categories of information that can be at  
14 least clumped together in that way that are highly  
15 discoverable, highly relevant to the case, from Bank of  
16 America, that Bank of America has so far refused to produce.  
17 The first category, which is sort of -- will take the most time  
18 to sort of quickly go through and explain, has to do with  
19 information that's relevant to whether Bank of America  
20 conducted a good-faith investigation under the Electronic Fund  
21 Transfer Act, and a reasonable investigation under the Fair  
22 Credit Reporting Act concerning our client.

23 So the types of documents and information that we're  
24 seeking here has to do with things that pertain to what Bank of  
25 America knew, what information was available to Bank of America



1 at the time that it conducted its investigation, whether the  
2 alleged misconduct is a repeated conduct or was an isolated  
3 incident, and similarly the frequency, persistence and nature  
4 of the alleged misconduct.

5           And so there's five specific types of information  
6 that fall into this first broad category about good faith and  
7 reasonable investigations. The first is the average amount of  
8 time and the average cost of investigating disputes under the  
9 Electronic Fund Transfer Act, Fair Credit Reporting Act. Based  
10 on the case law, this seems to be information that is routinely  
11 kept and routinely available, and court say does have bearing  
12 on whether or not a particular investigation was indeed  
13 reasonable.

14           The second has to do with complaints filed against  
15 Bank of America, both regulatory and in court, for the type of  
16 conduct alleged. Your Honor will remember we requested similar  
17 information from Chex Systems and were granted that request in  
18 some limited form that we found acceptable.

19           The third has to do with the use of a fake Barack  
20 Obama signature to commit fraud on Bank of America accounts.  
21 Here again we're really just looking to understand what  
22 information Bank of America was aware of and had available to  
23 it at the time that it conducted its investigation concerning  
24 plaintiff. Bank of America has said, as you've heard of  
25 course, that this was -- they determined this was part of a

1 certain kind of fraud trend, and we think we are entitled to  
2 know whether Bank of America was aware of this other fraud  
3 trend, that we've at least identified based on this and at  
4 least one previous case that was brought, but we think that  
5 there are others.

6           The fourth bucket of information in this larger  
7 category has to do with whether there were data or security  
8 breaches at Bank of America which would have compromised  
9 plaintiff's personal information; for example, allowing a  
10 fraudster to know her log-in information and therefore be able  
11 to deposit these fake checks into her account.

12           And the final thing -- the final question here in  
13 this first category has to do with the accuracy of Bank of  
14 America's investigations, and based on interagency guidelines,  
15 CFR Rules promulgated by the Consumer Financial Protection  
16 Bureau, it seems pretty clear to us that Bank of America --  
17 that all banks, in fact furnishers of this kind of information,  
18 are required to have certain documentation and information in  
19 place and to look back at the accuracy. So we're trying to  
20 understand what information Bank of America has about the  
21 accuracy of these types of investigations.

22           And secondly, looking to get some pretty basic  
23 information about certain accounts at Bank of America where  
24 there were either claims of unauthorized funds or whether there  
25 were disputes about negative reporting where the bank looked

1 into these matters and made determinations one way or the  
2 other.

3           What we're really trying to understand here is  
4 whether there is in fact a pattern and practice, as we've  
5 alleged, that Bank of America routinely neglects to conduct  
6 reasonable investigations when people bring to the bank's  
7 attention that there's fraud on their account or contest the  
8 reporting of themselves to consumer reporting agencies, whether  
9 the bank routinely failed to conduct reasonable investigations  
10 when these kinds of claims involve people who are low income.  
11 And again, throughout the course of this litigation, this is  
12 something we alleged in our complaint, and throughout the  
13 course of the litigation it has come up time and again from  
14 Bank of America, that indeed the income status of our client  
15 seems to have been a big factor here. So that's the first main  
16 category.

17           The second category concerns simply the policies and  
18 procedures that Bank of America has in place pertaining to both  
19 its investigations under these two federal statutes. Again, it  
20 seems clear that Bank of America has policies and procedures in  
21 place. They've actually provided some documentation along  
22 these lines, although it is heavily, and we would argue  
23 improperly, redacted. And the production so far, what we have  
24 been able to read, does suggest that relevant policies and  
25 procedures exist, for example, haven't been produced, for

1 example there's references to something called a front line  
2 unit that would be investigating these types of claims and  
3 would put certain procedures in place, and so we're wondering  
4 where those front line unit procedures are. We listed a number  
5 of other examples, and we really provided them by way of  
6 example, of the types of things that are alluded to or  
7 referenced in Bank of America's production that certainly seem  
8 relevant, that we have not received.

9           And then the third category has to do with Bank of  
10 America's contractual relationships with the CRAs. And the two  
11 things I really want to just highlight here are, first of all,  
12 that we know Bank of America reported our client to Early  
13 Warning Services. However, Bank of America has turned over  
14 nothing by way of contractual agreements or even communications  
15 between itself and Early Earning Services, even though again we  
16 know that they reported her and now they are in fact a partial  
17 owner of the company. And Chex Systems has actually agreed,  
18 through the course of discovery, to turn over its contract or  
19 agreement with Bank of America, pending Bank of America's  
20 agreement to do that mission, which Bank of America so far has  
21 withheld.

22           And Judge, I just want to say in general that  
23 discovery has been going on for seven months now. We've been  
24 doing our best to meet and confer and work through these  
25 issues. We do genuinely feel that Bank of America has not

1 acted in entirely good faith in responding to our requests.  
2 Bank of America, for example, to all but I believe one of all  
3 of our discovery requests, gave the same boilerplate  
4 objections. Bank of America has refused to tell us whether  
5 they are actually withholding any information that's  
6 responsive, based on those objections.

7           And Bank of America seems to continually bring new  
8 things up that weren't disclosed or shared earlier; for  
9 example, now saying that our client simply has to sign an  
10 authorization form in order to get access to her unredacted  
11 bank records. I mean, I'm just -- it's surprising that this is  
12 coming up so much later. Certain documents we've been  
13 requesting are now -- suddenly we're learning perhaps not  
14 readily available. I'm not sure what "readily available"  
15 means, but again it's the first time that we've even gotten  
16 into the territory of not just a pure objection, but, you know,  
17 this information might exist and might be hard for us to find,  
18 and therefore we don't want to produce it, so that's been  
19 troubling.

20           THE COURT: Okay. So it sounds like the information  
21 that you're seeking is going primarily to the argument that  
22 Bank of America did not do a reasonable good faith  
23 investigation, right?

24           MS. WEISSMAN: That's right, and there were two  
25 investigations, just to be really clear. There was the EFTA

1 investigation, which has to be a good faith investigation under  
2 the statute, and there's the reinvestigation, as it's actually  
3 called under the FCRA, which has to be reasonable under the  
4 statute.

5 THE COURT: Right. Okay. And so you're looking at  
6 what they knew at the time, so let's go to the -- let me start  
7 with the policies and procedures. So why can't you just turn  
8 those over, Mr. Despotakis?

9 MR. DESPOTAKIS: On the policies and procedures,  
10 Your Honor, we have turned them over. We have simply redacted  
11 what does not apply to the facts and the claims in this  
12 particular action --

13 THE COURT: But why?

14 MR. DESPOTAKIS: -- because the procedures that  
15 we've given, okay, the Fair Credit Reporting Act procedures,  
16 are not just procedures that relate to the kind of scenario we  
17 have here. They cut across the board institutionally; for  
18 example, for credit cards, for consumer credit debt, that is,  
19 by notes --

20 THE COURT: Right. So did you make clear that  
21 that's what you've redacted, or you just have big --

22 MR. DESPOTAKIS: Well, we have told counsel we've  
23 redacted everything that is not relevant --

24 THE COURT: Well, no.

25 MR. DESPOTAKIS: -- to this type of fact scenario.

1 THE COURT: Yeah, but that's not helpful. So if  
2 you've said, for example, under these black bars is the  
3 information on credit cards, which is not what's at issue here,  
4 that might give some guidance to the plaintiffs, "Okay, sure,  
5 it's credit cards, it might not be useful here." Under this --  
6 underneath here is something else. So in other words, you  
7 haven't given them the tools to actually get --

8 MR. DESPOTAKIS: We --

9 THE COURT: -- the information to say, "Okay, that's  
10 fine," or "No, actually, that's relevant," so you can --

11 MR. DESPOTAKIS: We had expressed a willingness to  
12 show the Court unredacted --

13 THE COURT: No, I don't want to see it.

14 MR. DESPOTAKIS: -- complete version, but --

15 THE COURT: I don't want to see it. What I'm saying  
16 is, you need to give your opposing counsel the tools to make  
17 the argument, and not just say, "We think it's not relevant."  
18 But maybe they think it's relevant and maybe they can make a  
19 good argument for it, so --

20 MR. DESPOTAKIS: Your Honor, that's fair enough.  
21 And if your -- if what the Court is suggesting is that we  
22 enunciate the general nature of what has been redacted --

23 THE COURT: No.

24 MR. DESPOTAKIS: -- we'll try to get it as speci --

25 THE COURT: No, I don't mean the general nature. I

1 want you to say what is redacted without --

2 MR. DESPOTAKIS: Well, yeah, yeah.

3 THE COURT: So for -- yes?

4 MR. DESPOTAKIS: That's what I'm talking about. I'm  
5 saying this relates --

6 THE COURT: You said "general nature."

7 MR. DESPOTAKIS: -- this relates to credit card  
8 transactions --

9 THE COURT: Okay.

10 MR. DESPOTAKIS: -- not involved in this case.

11 THE COURT: Yes.

12 MR. DESPOTAKIS: This relates to front line unit  
13 dealing with this on our fact pattern.

14 THE COURT: That's fine.

15 MR. DESPOTAKIS: That's the kind of thing I mean.

16 THE COURT: Okay.

17 MR. DESPOTAKIS: I don't mean talking ambiguously, I  
18 mean, by giving --

19 THE COURT: Right. When you said "general" --

20 MR. DESPOTAKIS: -- a clear indication --

21 THE COURT: -- that made me concerned and so -- and  
22 I've seen some of the arguments that you've made even in your  
23 pleading, which is in the nature of totally over-broad,  
24 speculative, senseless, vague, ambiguous --

25 MR. DESPOTAKIS: Yeah.



1 THE COURT: -- unduly burdensome, which isn't  
2 helpful even to the Court. So I'm concerned that you're not  
3 giving the information that is specific enough. So I'm not  
4 saying you have to actually reveal what's under it, because  
5 then it's -- it might as well not be redacted, but you do have  
6 to give at least as specific as you've now stated.

7 MR. DESPOTAKIS: I understand.

8 THE COURT: This is credit card investigations, this  
9 is --

10 MR. DESPOTAKIS: That's agreeable, Your Honor. We  
11 can do that.

12 THE COURT: Okay. So --

13 MR. DESPOTAKIS: We agree to do that.

14 THE COURT: -- you need to provide that. All right?

15 MR. DESPOTAKIS: Make a note.

16 THE COURT: There was this question about the front  
17 line unit.

18 MR. DESPOTAKIS: Yeah, again, it's one of those  
19 things that falls under that category --

20 THE COURT: But what is the front-line unit and why  
21 is it irrelevant?

22 MR. DESPOTAKIS: Off the top of my head, I do not  
23 recall at the moment --

24 THE COURT: Okay.

25 MR. DESPOTAKIS: -- but I do recall that it had

1 nothing to do with sold account scenarios or counterfeit check  
2 deposits --

3 THE COURT: Well, again --

4 MR. DESPOTAKIS: -- or transactions.

5 THE COURT: -- you need to give your opposing  
6 counsel enough information so they can argue it.

7 MR. DESPOTAKIS: Yeah.

8 THE COURT: But just calling it front line unit, not  
9 relevant, isn't helpful, because they can't say anything.

10 MR. DESPOTAKIS: We'll undertake to do that. I --

11 THE COURT: Right, and the presumption in a case --  
12 in a situation like this is that you do have to turn it over,  
13 unless there's a good reason not to, so you've got to  
14 present --

15 MR. DESPOTAKIS: All right.

16 THE COURT: -- the reason to opposing counsel.

17 MR. DESPOTAKIS: We'll go through it item by item  
18 and whatever has been redacted --

19 THE COURT: Yes.

20 MR. DESPOTAKIS: -- we can give an explanation.

21 THE COURT: Okay.

22 MR. DESPOTAKIS: That's fine, we agree.

23 THE COURT: You need to do that, and if you can't --

24 MR. DESPOTAKIS: We agree.

25 THE COURT: -- give a reason then you need to turn

1 it over. So let me --

2 MR. DESPOTAKIS: Your Honor, just --

3 THE COURT: -- turn to the third point --

4 MR. DESPOTAKIS: Your Honor, I'm sorry. If I may  
5 one moment?

6 THE COURT: Oh. Yes?

7 MR. DESPOTAKIS: The procedures and policies  
8 relating to EWS, that was not our document.

9 THE COURT: All right, but --

10 MR. DESPOTAKIS: I want to make clear that we're  
11 talking Bank of America documents.

12 THE COURT: Yes, the policies and procedures are  
13 Bank of America documents --

14 MR. DESPOTAKIS: Okay.

15 THE COURT: -- right? Yes?

16 MR. WEISSBERG: Your Honor, I just wanted to address  
17 two aspects. In the rubric of policies and procedures that  
18 they've made a request, they gave a list, among the items are  
19 some documents that are not Bank of America documents.

20 Specifically, is a document from Chex Systems and there's a  
21 document from EWS that is theirs. It's both confidential and  
22 proprietary of theirs. We -- it is subject to nondisclosure.  
23 We can't disclose it without --

24 THE COURT: But why is it part of your policies and  
25 procedures?

1 MR. WEISSBERG: No, no, it's not our policies and  
2 procedures. I'm just saying when she discusses policies and  
3 procedures, among the requests for discovery that she had made  
4 were for items that -- policies and procedures of EWS and Chex  
5 Systems that she's asking us to produce, and it's not our  
6 policies and procedures. And I'm just saying since EWS and  
7 Chex Systems has not consented to us producing those, it's not  
8 for us -- we cannot produce them.

9 THE COURT: Okay. So, Ms. Weissman, did you request  
10 Bank of America to turn over co-defendants' documents?

11 MS. WEISSMAN: I don't believe we did, Your Honor.  
12 First of all, a couple things. The list of documents that  
13 counsel is referring to, again, was provided by way of example  
14 to say, "Look, you've redacted a lot of stuff here, but, yeah,  
15 look at all these things that seem to be relevant policies and  
16 procedures that haven't been provided, suggest that something  
17 that's redacted might actually be relevant." The --

18 THE COURT: So Mr. Despotakis will now provide you  
19 more details as to what's been redacted.

20 MS. WEISSMAN: Yes, and I don't expect them to  
21 provide documents that they don't have or that aren't theirs --

22 THE COURT: Well, it sounds like they have the  
23 documents but it's not theirs.

24 MS. WEISSMAN: Well, this particular document, to  
25 talk about it, it shows up in a section of the policies and

1 procedures that were provided that's titled, "Duty of  
2 furnishers of information to provide accurate information," and  
3 it goes on then to talk about, "The following guidelines for  
4 reporting information to the CRA's." So while this is a  
5 document that I understand they're saying was created by Early  
6 Warning Services, it very clearly has to do with how Bank of  
7 America reports information to Early Warning Services, for  
8 example, which is certainly relevant to, if not at the heart of  
9 this litigation. So it is certainly relevant, and there is a  
10 protective order in place, and if they want to withhold or  
11 redact it, then, you know, as we've already discussed, they  
12 should tell us specifically what's in it. And Bank of -- I'm  
13 sorry, Early Warning Services, who's on the call right now, has  
14 also raised some issues with us, which I'm happy to respond to.

15 THE COURT: Right, but what I'm still confused about  
16 is the document request was for policies and procedures of Bank  
17 of America, right? And that's the request that's here. And it  
18 sounds like embedded in those policies and procedures are some  
19 references to these other entities. And so if the procedures  
20 are Bank of America procedures, that should be turned over. So  
21 I don't know what it is that doesn't belong to Bank of America  
22 that Bank of America is now saying, "Why should we turn it  
23 over, because how is it even responsive then to the request for  
24 Bank of America's policies and procedures?"

25 MR. DESPOTAKIS: Well, we've addressed I think one

1 half of this, because as we explained the redactions, will  
2 explain the basis as to why we believe it doesn't apply and  
3 they'll have a chance to review it. The second piece of this  
4 is that it may not be substantive. It may have nothing to  
5 do -- and that's my general recollection and sense. I don't  
6 want to misrepresent to the court, but that's my general  
7 recollection, that it simply relates to the computerized  
8 mechanics of how do you go on a keyboard to transmit to EWS or  
9 to Chex the information that you're reporting to them? All  
10 this is being generated by the bank after it made its core  
11 decision to transmit. These are all technical and data kinds  
12 of things that are very confidential and proprietary between  
13 EWS and Chex and the bank --

14 THE COURT: Well, but that --

15 MR. DESPOTAKIS: -- but it's the how-to, it's the  
16 mechanics --

17 THE COURT: Right, but that --

18 MR. DESPOTAKIS: -- not substance, not --

19 THE COURT: Right, but there are two pieces to that,  
20 right? One is, is that relevant, right, because you keep --  
21 you've said a couple of times now that it's mechanical?

22 MR. DESPOTAKIS: Okay.

23 THE COURT: But the other part of it is you're  
24 saying we have a -- it's not our document and we want to  
25 respect the confidentiality of these other parties.

1 MR. DESPOTAKIS: Right.

2 THE COURT: So which one is it? Is it that it's not  
3 relevant --

4 MR. DESPOTAKIS: It's --

5 THE COURT: -- or that it's relevant, but it's  
6 proprietary and not our business to disclose?

7 MR. DESPOTAKIS: Well, I would respectfully say,  
8 Your Honor, it's both. The first step of this is that it's  
9 proprietary, and barring the consent of EWS and Chex to turn it  
10 over, that would resolve that issue. The second leg of this is  
11 that to the extent it's mechanical -- in other words, it was  
12 simply Bank of America transmitting to both of these agencies,  
13 "This is what we've concluded. We are reporting this  
14 depositor."

15 THE COURT: But it's two different things because --

16 MR. DESPOTAKIS: And they're two different things,  
17 right.

18 THE COURT: Well, they're two completely different  
19 arguments, because if Bank of -- if Early Warning Services or  
20 Chex Systems consent to have those disclosed, then they'll be  
21 disclosed, if it's the second argument. If you say they're  
22 still not relevant, then that would be a different analysis.

23 MR. DESPOTAKIS: But we're arguing the relevancy of  
24 it --

25 THE COURT: Okay. So you're saying --

1 MR. DESPOTAKIS: -- and we would explain --

2 THE COURT: -- because it's mechanical --

3 MR. DESPOTAKIS: It's mechanical --

4 THE COURT: -- that it's not relevant.

5 MR. DESPOTAKIS: -- it has technical data as to what  
6 [indiscernible] there are security protocols not governing the  
7 claim, but security protocols governing the transmission of  
8 that customer's information --

9 THE COURT: So have you -- was that information that  
10 was conveyed to plaintiffs --

11 MR. DESPOTAKIS: It's part of the --

12 THE COURT: -- that it's not relevant?

13 MR. DESPOTAKIS: -- redaction and it falls under the  
14 same approach we just talked about, Your Honor, and we'll go  
15 through and explain to them what is in there and why we feel it  
16 should be protected.

17 THE COURT: So, Ms. Weissman, do you know of  
18 information that's different from what Mr. Despotakis has  
19 characterized as being withheld?

20 MS. WEISSMAN: I just know -- Your Honor is  
21 absolutely right, that we requested their policies and  
22 procedures. That's all that we're asking them to produce. If  
23 this is a document that we received -- and I don't think that  
24 it simply being technical makes it irrelevant. Then if it's  
25 not a document that Bank of America says is responsive to the



1 request, we certainly can request it --

2 THE COURT: That's why I'm wondering --

3 MS. WEISSMAN: -- from Early Warning Services, so --

4 THE COURT: That's why I'm wondering why we're  
5 having this discussion.

6 MS. WEISSMAN: Yeah, I think that's -- I think it's  
7 a bit of a red herring. I agree, Your Honor.

8 THE COURT: Okay. So once you disclose what has  
9 been redacted, it will become clear whether it is in fact a  
10 Bank of America policy and procedure document or it's somebody  
11 else's document. If it's someone else's document and it's not  
12 your policy or procedure, it's simply not responsive and you  
13 don't have -- to the request and you don't have to disclose it  
14 on that basis, but if there -- if it's some other basis that  
15 you're withholding or redacting, then you need to state that.

16 MR. DESPOTAKIS: All right, Your Honor.

17 THE COURT: Okay. So based on what I've been told,  
18 I'll deny that. Well, I'm going to hold off on it until  
19 Mr. Despotakis gives you more information as to what has been  
20 redacted, and then we can revisit --

21 MS. WEISSMAN: Exactly. We'd like to know  
22 certainly --

23 THE COURT: Yes.

24 MS. WEISSMAN: -- if it's part of their  
25 procedures --

1 THE COURT: Yeah.

2 MS. WEISSMAN: -- which it seems to be, in which  
3 case it would seem responsive, but if they're saying it's not  
4 responsive, we're happy to take a look at what they have and --

5 THE COURT: Yeah, and so my general ruling on that  
6 is the policies and procedures of Bank of America need to be  
7 produced, unless there's a very good reason to withhold it, and  
8 it's not just you don't think it's relevant, but it's simply  
9 irrelevant, and you need to provide enough details to  
10 plaintiff's counsel as to what it is so that they can  
11 counteract the argument, or make a relevancy argument that's  
12 informed by that knowledge. Okay?

13 MR. DESPOTAKIS: All right, Your Honor.

14 THE COURT: And so at that point, once you've had a  
15 chance to look at it, if you think that what's been redacted is  
16 in fact relevant and its being redacted on the basis of  
17 relevance, then you can come back to the Court with that  
18 information. All right? But if it's not Bank of America  
19 policy and procedure, it's not -- it's simply not responsive to  
20 that request and so you don't have to worry about it, but if  
21 it's incorporated and it is in fact a policy and procedure of  
22 Bank of America, then it is responsive and you've got to turn  
23 it over unless there's a very good reason based on relevance or  
24 some other thing, which you haven't told me.

25 MR. DESPOTAKIS: That's fine, Your Honor. Agree.

1 THE COURT: All right. So Ms. Hanson, I heard you  
2 start to say something on the phone. Is what you were trying  
3 to say still relevant?

4 MS. HANSON: Well, Your Honor, the letter that we  
5 submitted addresses this one document. I guess I will talk  
6 with plaintiff's counsel. We will take the position that it is  
7 irrelevant because it is completely technical in nature and  
8 highly proprietary, but I'm happy to have that discussion off  
9 line with plaintiff's counsel.

10 THE COURT: Okay. So please do and, you know,  
11 sometimes it's not clear when it says "technical requirements"  
12 what exactly it is, so again, without revealing what the actual  
13 technical requirements are, if you can have a discussion as to  
14 what is governed by it, then plaintiffs will then have the  
15 information to make their relevance argument. okay?

16 MS. HANSON: Understood.

17 THE COURT: So let me look at the third one,  
18 contractual relationships. So it says -- what I've got here is  
19 Chex is agreeing to turn that over, so is it being turned over?  
20 Mr. Wait?

21 MR. WAIT: So quite sometime ago when we were going  
22 through all the other discovery issues with plaintiff's  
23 counsel, one of the things that came up was the fact that Chex  
24 has a contract, in fact a series of contracts, with Bank of  
25 America. They're Bank of America generated contracts. They

1 have in there, you know, that they're confidential and  
2 proprietary, et cetera. Our position was, and remains, that  
3 while we don't object to turning them over, we wanted to get  
4 Bank of America sign-off, and accordingly we sent those  
5 documents over to Bank of America for their review. I believe,  
6 although I don't want to speak for them, that they concluded  
7 that in fact they were proprietary and they don't want to  
8 produce them.

9 THE COURT: All right. So then the problem is Bank  
10 of America, not Chex. Chex is fine turning it over. Bank of  
11 America says no.

12 MR. BROMBERG: I think, Your Honor, from what I  
13 remember seeing, these contracts fall within the same kind of  
14 analysis that we just went through, as to the procedures and  
15 policies. They are full of technical data, again, mostly  
16 dealing with the how-to's, is my recollection having gone  
17 through it, and it's in the same exact category as we've just  
18 discussed on the policy and procedure side of the equation.

19 THE COURT: So the -- your reason for not turning it  
20 over isn't that it's Chex's document --

21 MR. DESPOTAKIS: No, this is a contract clearly  
22 between --

23 THE COURT: This -- right --

24 MR. DESPOTAKIS: -- Chex and Bank of America.

25 THE COURT: -- but Chex is fine with turning it over

1 and Bank of America is not, so you're withholding it because  
2 you think it's not relevant because it's technical.

3 MR. DESPOTAKIS: It's technical, on grounds of  
4 relevancy. It has nothing to do with claims investigations or  
5 the substance of any investigation. It simply is the technical  
6 transmission of data, such as the bank's conclusion as to what  
7 it's reporting.

8 THE COURT: Okay. So Ms. Weissman, what  
9 specifically makes that contract relevant?

10 MS. WEISSMAN: So first of all, I would just say  
11 again that things being technical, I'm not sure why that makes  
12 them irrelevant. Certainly, to us it doesn't make it  
13 irrelevant. For us to understand the relationship between  
14 these entities; how information is reported, how information is  
15 deemed reliable. What kinds of procedures and technical or  
16 otherwise are in place? What kinds of warranties or  
17 representations are made about the data that's furnished and  
18 received between these kinds of companies? Are there  
19 indemnification obligations going -- you know, going on in  
20 there that would impact the kinds of rigor or the types of  
21 investigations that are going to be done?

22 And again, this isn't only -- I want to just  
23 highlight, it's not only about investigations. As we talked  
24 about last time we were here with you, Judge, the case has to  
25 do with both investigations and initial reporting. And so data

1 and -- I'm sorry, not just data, but any kinds of requirements  
2 or procedures, technical or otherwise, about how information is  
3 reported, how information is conveyed, we very much think is  
4 relevant and germane.

5 THE COURT: Okay. So it may be that you don't want  
6 to turn over information about specific names of databases and  
7 where they're turned over or individuals who are responsible  
8 for turning the information -- sharing the information from one  
9 entity to the other, but all those other things, right, I think  
10 all those other things about whether there are representations  
11 or indemnifications would be relevant to the relationship and  
12 what Bank of America is claiming to an outside party as to the  
13 data that is -- that they are conveying outside.

14 MR. DESPOTAKIS: I guess, well, things certainly  
15 such as contract price and those provisions --

16 THE COURT: Yeah, you could --

17 MR. DESPOTAKIS: -- we would say are proprietary.

18 THE COURT: Sure.

19 MR. DESPOTAKIS: The technical data is proprietary.  
20 But you're right, Your Honor, in one respect, but the main  
21 point I think is that there's nothing in this contract that  
22 provides instructions as to how the bank, on the one hand, is  
23 to investigate anything --

24 THE COURT: No, no, it's not about --

25 MR. DESPOTAKIS: -- or it's just simply --

1 THE COURT: -- the investigation, that's clear.

2 MR. DESPOTAKIS: Yeah.

3 THE COURT: It's about the conveyance of the  
4 information.

5 MR. DESPOTAKIS: Simple conveyance of the  
6 information.

7 THE COURT: Correct. And that is part of this  
8 claim, that it was not reporting accurate information.

9 MR. DESPOTAKIS: But, Your Honor, it's undisputed.  
10 The bank made the decision to report it. That's not in  
11 dispute.

12 THE COURT: Right.

13 MR. DESPOTAKIS: We reported it, and Chex and EWS  
14 accept that transmission from the bank --

15 THE COURT: But if --

16 MR. DESPOTAKIS: It's not for them to dispute, in  
17 terms of --

18 THE COURT: Well --

19 MR. DESPOTAKIS: -- what the bank is reporting  
20 initially.

21 THE COURT: -- but it's --

22 MR. DESPOTAKIS: We report it.

23 THE COURT: -- part of what the bank is saying  
24 itself that it is reporting.

25 MR. DESPOTAKIS: That's correct.

1 THE COURT: Right, and so --

2 MR. DESPOTAKIS: Yeah.

3 THE COURT: -- they're entitled to see what you're  
4 claiming to be reporting. It may be the proprietary  
5 information. The cost, fine, I don't think anybody cares about  
6 the cost, where the specific database is, where the information  
7 is located or, you know, where in its systems things are, I  
8 don't think that -- that part you can redact. What I'm having  
9 a problem with is your wholesale redaction of an entire  
10 document, and I think that the plaintiffs have made enough of  
11 an argument that it's relevant to their claim, that you should  
12 turn it over, subject to redactions for those very narrow  
13 specific things that are in fact proprietary.

14 So you need to go back and look at those documents  
15 and turn them over, redacting only the things that are  
16 proprietary, as you've said, because Chex has already said that  
17 they don't care; you can turn it over. So it's on you to  
18 assert that there are specific things that are truly not  
19 relevant, such as the price. Okay?

20 MR. DESPOTAKIS: I understand about the technical  
21 transmissions, Your Honor, and all that stuff, but again, I  
22 have a problem -- for example, what do we do when we review  
23 that document, and lets say there's an indemnification  
24 provision that has absolutely nothing to do with --

25 THE COURT: It doesn't matter --



1 MR. DESPOTAKIS: -- indemnification.

2 THE COURT: -- if you don't think it has anything to  
3 do with anything.

4 MR. DESPOTAKIS: No, no, I'm saying, really by its  
5 literal text has nothing demonstrable to do with the facts of  
6 any particular claim or the bank undertaking to indemnify Chex,  
7 or Chex undertaking to indemnify the bank, on something not  
8 involving a customer disputed claim.

9 THE COURT: I --

10 MR. DESPOTAKIS: Obviously, that we would look to  
11 carve out, because that relates to the relationship --

12 THE COURT: No, but --

13 MR. DESPOTAKIS: -- between the two institutions,  
14 having nothing to do with claims processing or certainly not  
15 the kinds of claim involved in this case. There may be  
16 broad-based indemnifi --

17 THE COURT: But it's not about claims processing.  
18 It's about conveying information, so it's just about the  
19 relationship. You are conveying information to Chex, okay, and  
20 so --

21 MR. DESPOTAKIS: And the repercussions of that  
22 conveyance is what Your Honor is saying?

23 THE COURT: Whatever you're saying about that  
24 conveyance, right, other than the specific database, the price,  
25 you know, those kinds of things no one cares about for this

1 litigation, but --

2 MR. DESPOTAKIS: That's fine.

3 THE COURT: -- you have to turn over the contract,  
4 subject to those things. Now, you may not care about -- you  
5 may not think the indemnification is important, but plaintiffs  
6 may, and so they're entitled to see it and then they can decide  
7 whether it's relevant or not.

8 MR. DESPOTAKIS: All right. We'll take that  
9 approach, Your Honor --

10 THE COURT: Okay.

11 MR. DESPOTAKIS: -- especially since I'm hearing  
12 that EWS and Chex has no -- if I heard them right.

13 THE COURT: Well, Chex --

14 MR. DESPOTAKIS: Do you have any underlying  
15 obligation?

16 THE COURT: -- doesn't have an objection. EWS, do  
17 you have anything to say about this?

18 MS. HANSON: I don't, Your -- I don't at this time,  
19 Your Honor. We have been served with discovery a couple of  
20 days ago requesting the contract, and to be candid, I haven't  
21 discussed it yet with my client. But I have heard the  
22 conversation that has transpired here and will take that into  
23 account once I advise my client.

24 THE COURT: All right. So if you have a concern,  
25 talk to Mr. Despotakis so that you can figure out specifically

1 the proprietary information that you think should be withheld  
2 because it's neither here nor there for this case. All right.  
3 So now let's turn to the first part of the motion to compel,  
4 which is about what Bank of America knew at the time of the  
5 investigation, so that plaintiffs can make their case that it  
6 was -- the investigations were not in good faith or reasonable.  
7 So the first question is about average time and cost of similar  
8 investigations. Is that right, Ms. Weissman?

9 MS. WEISSMAN: Yes, Your Honor.

10 THE COURT: So how is that being defined? Because  
11 one of the objections that Mr. Despotakis has brought up is  
12 there are lots of different investigations, every one is  
13 different. What difference does average make? Average is not  
14 a real number. It's just a -- it's sort of a made up,  
15 mathematical number. You add up all of the time or all of the  
16 money and then you divide it by the number of investigations  
17 and you get a number that perhaps is never true. Okay? So  
18 why -- number one, how are you going to define the universe,  
19 and number two, what good is an average?

20 MS. WEISSMAN: Sure. So the universe is defined, in  
21 terms of the theory side of it, claims where somebody -- or I  
22 should say investigations where an account holder disputed Bank  
23 of America's reporting of them for suspected fraud activity,  
24 and for the EFTA side of it, it would be claims where somebody  
25 disputed unauthorized deposits into their account. You know,

1 look, we're not -- if Bank of America has other more rational  
2 way of defining those categories based on what this information  
3 is about, I would be open to hearing what they are. I mean,  
4 this is based on our best understanding of -- based on the  
5 litigation, based on our best understanding of what information  
6 they would have.

7 But courts do seem to find this information relevant  
8 in understanding whether or not the investigation with respect  
9 to a particular plaintiff was reasonable, and to whether or not  
10 the actions and the alleged violations of the bank were  
11 willful. Because if it turns out that, you know, the bank is  
12 taking no time at all, for example, and going back to one of  
13 the things that we alleged that we keep coming back to, this  
14 idea of for low-income folks they're routinely failing to  
15 conduct a reasonable investigation and just denying claims of  
16 fraud on somebody's account.

17 Well, if it turns out that they're indeed -- you  
18 know, either way, right, either you can see the amount of time  
19 they spent with regard to plaintiff was much less time than the  
20 average, or perhaps the information would show that they indeed  
21 always spend very, very little time, which could help build a  
22 claim around willfulness, and the fact that they're not  
23 actually taking these kinds of complaints seriously, and  
24 they're not spending the time that a court would find is  
25 reasonable to actually investigate and determine one way or the

1 other.

2 THE COURT: Right. So that's why I don't understand  
3 why "average" helps you at all, because if you're saying that  
4 they always take a little -- too little time for low income  
5 people's investigations, the average isn't going to give you  
6 that information, because the average lumps in low income, high  
7 income, everyone, right, and then you really are only concerned  
8 about how much time they spent on your client's investigation.  
9 So if you -- I mean, I don't know how much time was spent. Is  
10 that one of the --

11 MS. WEISSMAN: That is one of the --

12 THE COURT: -- things that you've --

13 MS. WEISSMAN: -- questions, is how much --

14 THE COURT: Okay.

15 MS. WEISSMAN: -- I mean, how much --

16 THE COURT: All right. So --

17 MS. WEISSMAN: -- to understand what the average is  
18 so that we can get a better sense of -- with respect to what  
19 we've done in her particular case, that --

20 THE COURT: Well, but I guess my question is, do you  
21 know how much time was spent on your client's investigation?  
22 And how do you count that, right? Is it from the day in and  
23 then the conclusion --

24 MS. WEISSMAN: And --

25 THE COURT: -- because you don't also know how much

1 is being done while that's happening. It could have been, you  
2 know, reported on, I'm just making it up, Christmas Eve, and  
3 the investigation doesn't get concluded until the day after New  
4 Year's, right, and it looks like ten days, but actually only a  
5 day's work was done on it, you know. And so there's just a lot  
6 of flaws with your methodology, in terms of what you've told me  
7 you want to say. And then the other part of it is, if you say,  
8 well, then, if Bank of America is always giving poor people a  
9 short shrift, that's bad, but the information that you've  
10 requested doesn't really give you -- doesn't get you to that  
11 conclusion at all, because it's an average.

12 MS. WEISSMAN: I think the information would start  
13 to get -- and part of the reason we were looking for average,  
14 we were trying to make a request that was sort of reasonable  
15 and doable, and based on reading case law where averages are  
16 used, it seemed like a reasonable metric. I think that through  
17 depositions we could then have a baseline to ask some questions  
18 to better understand how much time was spent in this particular  
19 case, how decisions are made about, you know, what steps are  
20 going to be taken, and if different steps are taken with  
21 respect to different people.

22 But to just have some kind of baseline understanding  
23 I think was our goal at least, to just have a sense of -- and  
24 there's another important piece of this, actually, which is  
25 that the average cost of the investigations is really relevant

1 here. I mean, if Bank of America, you know, just -- for all  
2 the similar reasons we've said, but, you know, it certainly  
3 seems to us that there is not a big incentive, at least right  
4 now, for the bank to take these kinds of claims seriously,  
5 perhaps because low income people, you know, don't have a lot  
6 of money in the bank.

7 THE COURT: But you keep putting it in there, but  
8 this has nothing to do --

9 MS. WEISSMAN: Yeah.

10 THE COURT: -- with this argument, right? So the  
11 cost -- how would you measure the cost? If the cost -- if all  
12 the investigations are being done in-house, it doesn't cost  
13 them anything, right?

14 MS. WEISSMAN: Well, they --

15 THE COURT: So what is the cost?

16 MS. WEISSMAN: I guess there's -- if there's --  
17 depending on how many disputes there are, it does cost them  
18 something, because they're hiring people to do the disputes,  
19 and there may be an incentive, and there may be certain  
20 incentive structures. I mean, what we're really -- there --  
21 this is --

22 THE COURT: But you're making -- but, you see, then  
23 you're making an institutional argument, and you are only  
24 making -- you've only brought a case on behalf of your client.  
25 Okay. So to say that Bank of America needs to change its

1 attitude toward poor people because they're treating them  
2 badly, is neither here nor there for the purposes of this case.  
3 So that's why I'm concerned about -- you've talked about a  
4 baseline, but I don't know that you've really identified  
5 parameters that get to an accurate baseline.

6 MS. WEISSMAN: Let me take a step back, Judge. I'm  
7 sorry about this, but I think in our effort to keep the letter  
8 motion to three pages, we sort of lost some of the nuance of  
9 what we're --

10 THE COURT: So for --

11 MS. WEISSMAN: -- actually asking about.

12 THE COURT: Let me just stop. For both sides,  
13 you've both mentioned the three-page limit. If you need it, if  
14 you need more pages, you can always ask the Court to do that.  
15 And don't waste your time on, you know, the boilerplate  
16 language, and certainly don't make the margins so small and the  
17 font so small, you know, that that's not a way to hit the page  
18 limit. Okay? So since you've now brought up -- both sides  
19 have brought up the page limit, I want you to know you  
20 should -- if you need to make the argument because there's  
21 multi-pronged -- just ask the Court for more pages and don't  
22 waste the pages you've got on boilerplate language. Okay?

23 MS. WEISSMAN: Thank you, Judge.

24 THE COURT: So moving forward you should be aware of  
25 that, but go ahead.



1 MS. WEISSMAN: We -- the cat -- the broader category  
2 about average time and cost, for example, includes specific  
3 interrogatories asking for the identity of people at Bank of  
4 America who have knowledge about the average and/or median  
5 amount of time that was spent and the cost of investigating  
6 these types of claims. So we're trying to identify the  
7 universe of people who might have relevant information and  
8 could answer questions in a deposition about the overall  
9 processes that the bank uses to do this kind of work, to  
10 perform these types of investigations.

11 THE COURT: Okay. So let me ask Mr. Despotakis,  
12 what systems are -- so is this information available, and how  
13 can we get to establish a baseline?

14 MR. DESPOTAKIS: A couple of things, Your Honor.  
15 This information would not be readily available. It would have  
16 to be painstakingly put together at some cost to the bank to do  
17 this. I would add to that that this is one case involving  
18 Ms. Ruane, and I have to harken back to the fact that the  
19 bank's decision in this matter to report her, and to reach the  
20 conclusion it did, was based on not only documentary evidence  
21 before it pertaining to Ms. Ruane and the deposit of these  
22 checks, but also the electronic information before it as it did  
23 its investigation.

24 When these claims come in, they're not segregated;  
25 you put pile one with people who are rich, and let's look at

1 their account balances to make sure they're rich, and here's  
2 pile B with everybody who's not rich and we put them in this  
3 pile. These things go in to seasoned investigators. They are  
4 assigned a claim as it's received, is my pretty general, but I  
5 think pretty accurate understanding, and it is investigated,  
6 consonant with the facts of the transaction, the electronic  
7 record, the documentary evidence. In this particular case, as  
8 our discovery responses have shown, the initial investigator  
9 made her conclusion.

10 THE COURT: Okay.

11 MR. DESPOTAKIS: It was reviewed by a supervisor --

12 THE COURT: All right. Let --

13 MR. DESPOTAKIS: -- who came to the same  
14 conclusions.

15 THE COURT: Okay. So let me stop you there.

16 MR. DESPOTAKIS: This is irrelevant.

17 THE COURT: Let me stop you there. It seems like a  
18 very basic problem in this case is the parties don't have a  
19 clear idea of how the -- how investigations are done and how  
20 this investigation was done, right, because if you understand  
21 all the different steps, that would go a long way toward the --  
22 resolving the issue of whether this investigation was in good  
23 faith and reasonable. Right?

24 And so it sounds like this issue of the baseline is  
25 a proxy for the reasonableness, and to me it seems at this

1 stage anyway extremely rough, right, because it could be that  
2 the bank did a very short investigation and very efficient  
3 investigation because it already had a lot of information from  
4 prior investigations. And so to judge the reasonableness of  
5 the investigation on the time or cost doesn't strike me as  
6 being fair or relevant, especially given the difficulty that  
7 we're having in coming up with the metrics of how to calculate  
8 that average.

9           So it seems to me much more important for this case  
10 that everyone get their arms around how this invest -- how  
11 investigations are generally done and how this investigation  
12 was done, because then you can compare, not based on numbers,  
13 time or money, but based on what happened and the steps that  
14 were taken. And it doesn't sound like the parties actually  
15 have their arms around that. Right, Ms. Weissman? Do you know  
16 how the investigations are done?

17           MS. WEISSMAN: I'm going to turn to my co-counsel,  
18 actually.

19           THE COURT: Mr. Bromberg, do you know how the  
20 investigations are done --

21           MR. BROMBERG: Well, I mean --

22           THE COURT: -- or am I not giving you enough credit?

23           MR. BROMBERG: Well, with respect, I honestly have  
24 not had a lot of litigation with Chex Systems, and I think all  
25 the --

1 THE COURT: No, more importantly, with Bank of  
2 America --

3 MR. BROMBERG: I --

4 THE COURT: -- because the investigation is  
5 really -- was Bank of America's issue.

6 MR. BROMBERG: I know how FCRA investigations take  
7 place in general, more particularly with the "Big Three," with  
8 TransUnion, Equifax, and Experian. Essentially, what happens  
9 is --

10 THE COURT: Well, I don't need to have -- we don't  
11 have time. We've already spent two hours here --

12 MR. BROMBERG: Okay, okay.

13 THE COURT: -- so I don't need to know -- I don't  
14 need to know, but I want to know that the parties know. And  
15 what I'm saying is to use this baseline calculation as a proxy  
16 for the details of what happened here and what should happen  
17 seems so rough, that when I'm looking at the proportionality of  
18 ordering the production, given that it doesn't seem to exist,  
19 because we also can't agree at the moment on what the  
20 measurements are, right, so that I'm going to deny this  
21 request. But it seems more important for the parties to  
22 actually understand what was happening, so you don't need a  
23 proxy for the baseline. Right?

24 MR. BROMBERG: But, Your Honor, actually, something  
25 that will come up, and I know it's going to come up when we get

1 to the depositions, is there's going -- we're going to have to  
2 have some kind of discussion with whoever did the particular  
3 investigations at the various stages, we're going to need  
4 information as to how many investigations they did that day,  
5 how much time they spent on each investigation --

6 THE COURT: That's fine.

7 MR. BROMBERG: -- or that week, for instance --

8 THE COURT: That's fine.

9 MR. BROMBERG: -- and drill down to the fact that  
10 very little time is in fact --

11 THE COURT: That's fine.

12 MR. BROMBERG: -- devoted to these in --

13 THE COURT: If that's the argument you want to make  
14 in that context, that sounds fine, but to ask for an average of  
15 sort of everything just seems like the bigger the universe, the  
16 more meaningless the average number is. So I -- and it's going  
17 to be difficult to generate that concrete number, because  
18 sitting here I don't know that the parties have agreed on what  
19 that -- or, you know, has a conception of what that definition  
20 is going to be. All right?

21 MR. BROMBERG: Okay.

22 THE COURT: So I am going to deny the motion to  
23 compel the average of this investigation time and cost --

24 MR. BROMBERG: There may also be --

25 THE COURT: -- because I don't think it's --

1 MR. BROMBERG: We may find that there are metrics  
2 that approximate a lot of this.

3 THE COURT: Yes, that's fine.

4 MR. BROMBERG: I believe that some --

5 THE COURT: You can explore that.

6 MR. BROMBERG: -- of the "Big Three" do keep these  
7 kinds of metrics.

8 THE COURT: That's fine. You can explore that --

9 MR. BROMBERG: Okay.

10 THE COURT: -- but to ask them to generate that  
11 number now seems disproportionate.

12 MR. BROMBERG: Okay.

13 THE COURT: Okay? So -- yes?

14 MS. WEISSMAN: Your Honor, I'm sorry, there's  
15 just -- there's one other request for production that isn't so  
16 well captured I think by this discussion so far that we had  
17 made, but which we do reference in our letter under this  
18 category, which is documents concerning any programs under  
19 which there were any kinds of bonuses or incentives or other,  
20 you know, payment structures around the investigations arising  
21 under the Electronic --

22 THE COURT: You made that request and they have  
23 refused to turn over information?

24 MS. WEISSMAN: That's right. That's request for  
25 production 19. It's on Page 11 of Exhibit D.

1 THE COURT: Well, I don't see it in your papers.  
2 Number 1-A just talks about the average time and cost of  
3 investigating. So where are -- where have you said that  
4 there's a problem with the bonuses?

5 MS. WEISSMAN: So it lists a number of requests for  
6 production that are encompassed within this general heading.

7 THE COURT: But I haven't -- so I --

8 MS. WEISSMAN: And I'm specifically looking at 19.

9 THE COURT: Right, but I don't -- I didn't have a  
10 cha -- this was not brought to my attention, so I haven't had a  
11 chance to look at it. What exactly are you looking for at this  
12 point?

13 MS. WEISSMAN: Well, again, this -- the reason that  
14 we put this under this request is because it goes to cost and  
15 it goes to this question, but this is a little bit -- we're not  
16 looking for average cost, but to understand whether there are  
17 programs in place that would incentivize spending more or less  
18 time on these types of investigations.

19 THE COURT: Well, you should go back, and if there  
20 are specific -- like I've said, that the -- I'm denying as to  
21 the average, because that's what you asked for, okay, and --  
22 but I'm saying -- because I'm denying it because I think the  
23 baseline that you've proposed is meaningless. All right? I  
24 understand ultimately what your argument is going to be, and so  
25 I'm suggesting that there are other ways for you to get it.

1           Now, if you're saying that they've -- that you've  
2 specifically asked the question getting to something other than  
3 averages and it has not been produced, then you can make a  
4 specific argument on that point and then I'll look at it, but  
5 at this point I've only focused on the average, so the  
6 specifics are a different issue, which is not before me now,  
7 notwithstanding that it's encompassed in that particular  
8 request for information, or request for production. All right.

9           MR. DESPOTAKIS: Your Honor, on that --

10          THE COURT: So we're also --

11          MR. DESPOTAKIS: Oh.

12          THE COURT: -- really running out of time so I want  
13 to move. Okay? So if -- you've brought it up. I've looked at  
14 it, but if you didn't really bring it to my attention I haven't  
15 focused on the issues, so I won't be prepared to rule on that.  
16 But if there's something specific, and I think both sides  
17 understand what I'm talking about, Mr. Despotakis, you need to  
18 go back and look at your approach. I think the plaintiffs are  
19 entitled to understand exactly how this process works. So you  
20 can't say, "Well, we don't think it's relevant," so I think you  
21 need to go back, and to the extent that there are responses  
22 that you can revisit or you should be revisiting, you should do  
23 so.

24          MR. DESPOTAKIS: I can commit to -- from my general  
25 understanding and what I've been told from the client, there is



1 no such program, and if that would be the easy answer, in the  
2 interest of moving it along, I'll be happy to --

3 THE COURT: Right, but please --

4 MR. DESPOTAKIS: -- pick up the phone and let  
5 plaintiffs know.

6 THE COURT: -- just the flavor of the responses that  
7 have gone back and forth causes me concern, and it's causing us  
8 to spend massive amounts of time on discovery. It would just  
9 be helpful if parties would stop saying things like unduly  
10 burdensome, over-broad, speculative, senseless, vague and  
11 ambiguous, okay, because if you've got a specific reason for  
12 not turning it over, just say it. Okay? And if you don't --  
13 if it's too vague, ask them what they mean. What exactly are  
14 you looking for, right --

15 MR. DESPOTAKIS: And in all honesty, Your Honor --

16 THE COURT: -- instead of just saying it's vague and  
17 ambiguous.

18 MR. DESPOTAKIS: In all honesty, Your Honor, we also  
19 viewed that as part and parcel of the average time, because it  
20 went to the issue of how do these investigators perform their  
21 duties, within what time frame, what averages --

22 THE COURT: I know, but what I'm saying is that  
23 everybody should be exchanging full information as to how  
24 investigations are done and how they were done in this case --

25 MR. DESPOTAKIS: All right. I'll speak to the

1 client.

2 THE COURT: -- and that's the heart of the case, so  
3 just get that information exchanged. And I don't understand  
4 why it's taken so long and everybody's being so, you know,  
5 squirrely about the information. This is what the case is  
6 about, so turn it over. All right? And again, in responses to  
7 the discovery requests, if you say over-broad, speculative,  
8 senseless, vague, ambiguous, unduly burdensome, it gives the  
9 other side no information as to the basis and it gives the  
10 Court no information as to the basis.

11 MR. DESPOTAKIS: I was reminded of something by  
12 Mr. Weissberg, if he can be heard --

13 THE COURT: All right. Did you --

14 MR. DESPOTAKIS: -- on this point.

15 THE COURT: You were talking while I was talking.  
16 Did you hear what I said?

17 MR. DESPOTAKIS: I did, Your Honor, I did.

18 THE COURT: All right.

19 Yes, Mr. Weissberg, what did you want to say?

20 MR. WEISSBERG: Just to clarify, Your Honor, I  
21 believe we had given them discovery about the process -- I'd  
22 have to go through my papers to find it, but I believe we did  
23 elaborate with them in some of our discovery responses about  
24 the processes that -- identifying the things that they would  
25 value -- take into account in evaluating the -- a claim in

1 their investigation --

2 THE COURT: Okay.

3 MR. WEISSBERG: -- I recall.

4 THE COURT: So sit down and talk through it. All  
5 right? Have an informal discussion, you know, short of a  
6 deposition, where you've gotten all the information you need  
7 from your client. I'm still hearing from you, you know, "My  
8 client informs this, or I'm not exactly sure, but it's that."  
9 But you need to get your arms -- you need to have a very frank  
10 discussion with your client about everything that happened, and  
11 then you need to make an assessment as to how much of that  
12 should be revealed, given that you have obligations in  
13 discovery. All right? I'm not ordering that you have to turn  
14 it all over, because obviously you have attorney/client  
15 privilege, but you -- it doesn't feel like you actually know  
16 how this investigation was done, and I -- and if you do know,  
17 you've got to start sharing that information with the  
18 plaintiffs, and if the plaintiffs have questions about it,  
19 because it's not clear because of the way you phrased it, then  
20 you need to clarify it, so just do that.

21 MR. DESPOTAKIS: I recall what Mr. Weissberg was  
22 referring to, and I think Brian will remember. One of the  
23 responses we gave in our written discovery was exactly what the  
24 particular investigator did, what metrics she used and what  
25 considerations went into her decision, and we gave that chapter

1 and verse over in discovery.

2 THE COURT: Okay. But if there are other issues  
3 related to it, how long did it take, were there other people  
4 consulted or hired to help out, were -- you know what I mean,  
5 right?

6 MR. DESPOTAKIS: That's right. We disclosed that.  
7 We [indiscernible] --

8 THE COURT: Okay. So then --

9 MR. DESPOTAKIS: Yeah.

10 THE COURT: Well, I'm hearing that some of it  
11 wasn't, but so sit down and clarify, because sometimes it's not  
12 clear. You think you're clear, but you haven't made yourself  
13 clear or there are lingering questions. And for example on the  
14 bonuses, why wasn't the response, "There wasn't any," right, so  
15 that's the problem. When you give responses that are vague,  
16 speculative, et cetera, instead of "There weren't any," if  
17 there weren't any, then just say it. Then we're done and we  
18 wouldn't have to have a discussion about it, and we'll create  
19 an illusion or the impression that there's something you're  
20 hiding or not disclosing. So I'm just imploring the parties to  
21 take that approach with this case. Okay?

22 We tried to settle it, it wouldn't settle, so the  
23 case is headed toward a dispositive motion and a trial, and at  
24 that point everything will come out. Okay? So there's no  
25 point in prolonging the process. Just get it out there, have a

1 discussion, understand what your client's process is,  
2 understand what you need for your case, and then start -- or  
3 move more efficiently in exchanging that information. All  
4 right? So if you don't have it, just say you don't have it.  
5 All right. So that was A.

6 Let's look at B, complaints against Bank of America.  
7 You're talking about all complaints of this nature and you want  
8 to see what problems they had, because of what notice they  
9 might have about this kind of case.

10 MS. WEISSMAN: Exactly.

11 THE COURT: Right. Okay. So why is that not  
12 relevant, Mr. Despotakis?

13 MR. DESPOTAKIS: First, Your Honor, I don't know  
14 that the bank maintains the metrics; in fact, I know they don't  
15 maintain metrics along these parameters. And complaints --  
16 now, again, it's a single action involving a single plaintiff  
17 and what happened to her. People file complaints and  
18 litigation against Bank of America daily across a broad  
19 spectrum of claims. It doesn't bear any relationship as to  
20 what those other cases and those fact patterns are. They don't  
21 tie into what happened to Ms. Ruane and her claims, and --

22 THE COURT: Well, okay, but here it's specifically  
23 not about all complaints, like a bank teller was rude to me or  
24 something like that. It's about Bank of America's failure to  
25 properly or accurately investigate disputes of fraud, identity

1 theft or unauthorized transactions, so that's pretty narrow.

2 MR. DESPOTAKIS: Well, again, the bank, to my  
3 understanding and my knowledge, does not maintain the metrics  
4 in that fashion. And what do we mean by complaints? If we  
5 mean --

6 THE COURT: Well, when you say "maintain those  
7 metrics," they keep a record of all the investigations they  
8 did, right?

9 MR. DESPOTAKIS: The actual investigation --

10 THE COURT: Yes.

11 MR. DESPOTAKIS: -- but whether there's a way to  
12 correlate it and pull up --

13 THE COURT: And then --

14 MR. DESPOTAKIS: -- what involved -- the types of  
15 claims that are defined by the request, such as Reg. E --

16 THE COURT: So Bank of America cannot say how many  
17 investigations they did into fraud, identity theft or  
18 unauthorized transactions?

19 MR. DESPOTAKIS: To compile those metrics, it's  
20 almost counterintuitive, Your Honor, because on the one hand  
21 plaintiff is saying, "What did you do with Ms. Ruane? How did  
22 you investigate this?"

23 THE COURT: Right, but --

24 MR. DESPOTAKIS: How do other complaints --

25 THE COURT: -- my question isn't about relevance at

1 this point. You said they don't compile those metrics, so  
2 you're saying Bank of America literally does not know --

3 MR. DESPOTAKIS: No, I'm saying to --

4 THE COURT: -- how many investigations they did?

5 MR. DESPOTAKIS: -- compile them would be out of  
6 range and out of --

7 THE COURT: Why can't they just run -- it seems like  
8 you'd just run the database, all the cases where there was  
9 fraud, identity theft or unauthorized transactions, and you  
10 come up with a number; let's say it's 100.

11 MR. DESPOTAKIS: For what time period and what --

12 THE COURT: Okay. Well, we can talk about the time  
13 period.

14 MR. DESPOTAKIS: -- and what state? In what time  
15 period; in what state?

16 THE COURT: Okay. Well, we can talk about that, but  
17 that wasn't your objection, right? So you said they don't have  
18 the metrics, but let's talk -- it sounds to me that they should  
19 be able to run those metrics pretty easily, but we need to have  
20 parameters around it.

21 MR. DESPOTAKIS: And again, is it a phone dispute  
22 and somebody who backed off the claim and didn't pursue it?

23 THE COURT: Well, let's find --

24 MR. DESPOTAKIS: Is it -- yeah.

25 THE COURT: So this is what I'm saying, to say, "I

1 don't know what you're talking about," isn't a reason to come  
2 to the Court and ask for clarification. It means you talk to  
3 the plaintiff and get clarification. Right? If you don't know  
4 what it's about, you should have that discussion. Yes.

5 MS. WEISSMAN: Your Honor, if I may? It's very  
6 specifically asking about regulatory complaints or complaints  
7 filed in court. We're not asking for any time there was ever a  
8 complaint about --

9 THE COURT: By an individual?

10 MS. WEISSMAN: Yes, exactly.

11 THE COURT: Right, it's regula -- I see. All right,  
12 so that's even better.

13 MS. WEISSMAN: Complaints filed in court. And so,  
14 you know, right, if they have a legal department who tracks  
15 this kind of information --

16 THE COURT: Yes, okay. I didn't see that because  
17 your first sentence was complaints, so --

18 MR. DESPOTAKIS: Your Honor, the other issue to  
19 this --

20 THE COURT: -- wait, no --

21 MR. DESPOTAKIS: Oh, I'm sorry.

22 THE COURT: -- don't put in another issue.

23 MR. DESPOTAKIS: Oh, no.

24 THE COURT: We're just talking about the narrow  
25 issue --



1 MR. DESPOTAKIS: Yeah.

2 THE COURT: -- of regulatory and legal complaints.

3 MR. DESPOTAKIS: Customer --

4 THE COURT: It seems like that would be very easy to  
5 track.

6 MR. DESPOTAKIS: Customer privacy under the --

7 THE COURT: No, but --

8 MR. DESPOTAKIS: -- federal statute. These  
9 complaints would contain information on customers --

10 THE COURT: No, they're not asking you to turn it  
11 over, they're just saying the complaints -- it's a list of the  
12 complaints by regulatory -- regulatory complaints and legal  
13 complaints, just a list.

14 MS. WEISSMAN: Your Honor?

15 THE COURT: Yes.

16 MS. WEISSMAN: In the context of this same  
17 conversation that happened with Chex Systems, you had  
18 determined that they could provide a list, but to the extent  
19 that they had some things in their possession that were easy to  
20 turn over, therefore, that they should do that, so that we're  
21 not unduly burdened to going to track them down, so I think  
22 we're looking for a similar result.

23 MR. DESPOTAKIS: But the federal privacy statute  
24 precludes that. We cannot reveal the name of the person who  
25 made any claim, assuming this stuff can be pulled together,

1 we'll find that out, but we can't reveal the customer. We  
2 can't reveal the details of their --

3 THE COURT: Hold on, wait, wait. Yes.

4 MS. WEISSMAN: If somebody made a complaint in  
5 court, brought a lawsuit or a regulatory complaint, that's  
6 public record. This isn't confidential information.

7 Somebody's put themselves out there. These complaints are --

8 THE COURT: Okay. It's limited to regulatory and  
9 legal complaints, not a private complaint to the bank.

10 MR. DESPOTAKIS: If we're saying regulatory and  
11 legal, are we saying --

12 THE COURT: It's a lawsuit --

13 MR. DESPOTAKIS: -- complaints by the bank's  
14 regulators --

15 THE COURT: No.

16 MR. DESPOTAKIS: -- on that side of the equation?

17 THE COURT: It's a complaint to an administrative  
18 body, for example, right --

19 MS. WEISSMAN: Yes.

20 THE COURT: -- or a lawsuit.

21 MR. DESPOTAKIS: Okay. So that's one category, or  
22 an action that was based on that. All right. Now we have to  
23 address --

24 THE COURT: Those are public record.

25 MR. DESPOTAKIS: And I don't know that -- well, to

1 the extent that the regulatory complaints were filed with  
2 regulators -- because I'm aware there are some  
3 confidentiality --

4 THE COURT: If you are aware of them --

5 MR. DESPOTAKIS: -- there are some  
6 confidentiality --

7 THE COURT: No, no. If there's been a complaint  
8 filed with a regulatory body there's no confidentiality,  
9 because they filed it with a public body, and therefore if you  
10 have knowledge of that information, that's what's being  
11 requested.

12 MR. DESPOTAKIS: The actual filing, not the content,  
13 all right, subject to the -- on the items described.

14 THE COURT: Or if you have a copy of that complaint,  
15 turn it over, because it's easy to do.

16 MR. DESPOTAKIS: There may be regulatory  
17 restrictions against providing the actual copy of a  
18 regulatorily filed complaint.

19 THE COURT: No, there aren't, because the regulatory  
20 cop -- filing is a public document, so if you have a public  
21 document and you're being asked to turn it over in the course  
22 of discovery, you turn it over. There's no restraint on your  
23 turning over a public document.

24 MR. DESPOTAKIS: We will consult with our client,  
25 but I think --

1 THE COURT: Well --

2 MR. DESPOTAKIS: -- there may be some, Your Honor.  
3 We will advise properly.

4 THE COURT: -- if you have a legal basis for that,  
5 then fine, assert it --

6 MR. DESPOTAKIS: Yeah.

7 THE COURT: -- but you can't just say, you can't  
8 turn it over --

9 MR. DESPOTAKIS: All right. So --

10 THE COURT: -- because it doesn't make sense.

11 MR. DESPOTAKIS: All right. So we need to talk I  
12 guess about --

13 THE COURT: But, see, this is --

14 MR. DESPOTAKIS: -- dates? But I --

15 THE COURT: -- again, and I'm just going to go back  
16 to what I said a few minutes ago. If you would just ask what  
17 they're asking for instead of just saying it's unduly  
18 burdensome and vague, then you would know that this is all  
19 they're asking for.

20 MR. DESPOTAKIS: Their definition, Your Honor, of  
21 what they were looking for is "unauthorized transactions."  
22 Now, identity theft, okay, fraud is a broad brush so we need to  
23 narrow that down.

24 THE COURT: Right, so -- okay. So I'm going to  
25 stop, because we've been at this for two-and-a-half hours.

1 I've put off all my other hearings for this. There are other  
2 people waiting. And the reason this is taking so long is that,  
3 Mr. Despotakis, you have not been reaching out to plaintiff to  
4 get clarification as to things that they've asked for. If you  
5 would just have a conversation and find out what they're asking  
6 for, you would have clarification, because all I'm hearing is,  
7 "I don't know what they're talking about." Right?

8 MR. DESPOTAKIS: We've had discussions.

9 THE COURT: So why is this still an issue?

10 MR. WEISSBERG: If we could address the Court, Your  
11 Honor? There have been discussions back and forth. The  
12 trouble that is -- I believe is that the discovery is so  
13 over-broad and over-burdensome -- I mean, when you use terms  
14 like --

15 THE COURT: So why haven't you had a discussion to  
16 narrow it?

17 MR. WEISSBERG: But there have been discussions. I  
18 wasn't part of those discussions, but there were numerous  
19 discussions beforehand. Terms like "unauthorized transactions"  
20 encompasses the universe --

21 THE COURT: Okay, so --

22 MR. WEISSBERG: -- or general terms like "fraud" --

23 THE COURT: So did you ask for and get clarification  
24 as to what they meant?

25 MR. WEISSBERG: Well, it seems like they're asking

1 not just about this particular customer, Ms. Ruane, but about  
2 all the bank's customers, any, and it's just -- it's --

3 THE COURT: But --

4 MR. WEISSBERG: -- on their face they're so  
5 over-broad --

6 THE COURT: No, but on their face it's not  
7 over-broad, because it's just about regulatory and legal  
8 complaints. Now, regulatory complaint itself might not sound  
9 very clear, and if you had asked they would have told you, it's  
10 complaints that customers made in a court of law, those are the  
11 legal complaints, or in a -- to an administrative body. Okay?  
12 And then your universe has narrowed significantly, because  
13 these are now public filings that you may have. And it's not  
14 about customers picking up the phone and complaining to the  
15 bank directly. All right? So that's --

16 MR. WEISSBERG: It would be virtually asking the  
17 bank for its entire litigation list --

18 THE COURT: That may be.

19 MR. WEISSBERG: -- in existence, because --

20 THE COURT: And then --

21 MR. WEISSBERG: -- any unauthorized transaction --

22 THE COURT: Okay. So then --

23 MR. WEISSBERG: -- for any customer --

24 THE COURT: Yes.

25 MR. WEISSBERG: -- is effectively asking the

1 Court --

2 THE COURT: That may be, in which case if there is a  
3 litigation list, it's also very easy to turn over. All right?

4 MR. DESPOTAKIS: But it gets to relevance and unduly  
5 burdensome. If the bank --

6 THE COURT: It's not unduly burdensome, because you  
7 have it. You told me there's a list.

8 MR. DESPOTAKIS: No, no, I didn't say that there was  
9 a list. I was saying what they're asking for is a list. I  
10 don't know what the bank would have to --

11 THE COURT: Well, talk to your legal -- to the  
12 bank's inside counsel and see if they maintain a list. I would  
13 assume a general counsel has a list of litigation.

14 MR. DESPOTAKIS: We will discuss, Your Honor, and a  
15 potential time frame as well, but in terms of litigation filed  
16 with courts, that's a matter of public record. They can do a  
17 search --

18 THE COURT: Yes, and so I'm --

19 MR. DESPOTAKIS: -- and find all that information.

20 THE COURT: -- saying if you have that information,  
21 because I'm looking at proportionality and burden, if you're  
22 saying you have a list, then you should turn it over, because  
23 it's very -- a very low burden, okay, so just turn --

24 MR. DESPOTAKIS: But we don't have a list.

25 THE COURT: Well, but you don't --

1           MR. DESPOTAKIS: It would be something the bank  
2 would have to comply, back to the proportionality argument. I  
3 don't know what they have.

4           THE COURT: But you haven't told me what the burden  
5 is, so I can't weigh the burden because I don't know what it  
6 is. And you don't know if there's a burden or if it's just  
7 typing a few things in the computer and generating a list. So  
8 you're not informed at this moment to make those arguments.

9           MR. DESPOTAKIS: But the flip side, Your Honor, if  
10 plaintiff's counsel wants to find cases filed against the bank  
11 in state A, B, C, D, or E --

12           THE COURT: And that's a --

13           MR. DESPOTAKIS: -- in whatever court, they can do a  
14 search and come up with whatever is there --

15           THE COURT: Well, I'm --

16           MR. DESPOTAKIS: -- rather than the bank having to  
17 scour --

18           THE COURT: Well, but I do know what that burden is,  
19 and that is a burden, so if I'm weighing burdens, it's a lower  
20 burden on the bank, possibly, to turn over the list of  
21 litigation, as opposed to making the plaintiffs do it, and  
22 that's part of what the Federal Rules say. I'm supposed to  
23 weigh the burdensomeness.

24           MR. DESPOTAKIS: Right.

25           THE COURT: And so weighing it based on the



1 information I have now, I'm saying it weighs in favor of your  
2 turning it over. Okay?

3 MR. DESPOTAKIS: All right. We will consult with  
4 our client and we'll speak with Brian and see if we can narrow  
5 down the --

6 THE COURT: Right.

7 MR. DESPOTAKIS: I mean, it can't be throughout the  
8 United States. That to me --

9 THE COURT: Well, have that discussion.

10 MR. DESPOTAKIS: -- instinctively is not -- yeah.

11 THE COURT: Right? Just have that discussion as to  
12 what it is and why that's important.

13 Yes, Ms. Weissman.

14 MS. WEISSMAN: Yes, not to belabor the point. We do  
15 set forth a time period. We haven't been asked to circumscribe  
16 it, so --

17 THE COURT: So have a discussion about the time and  
18 the scope, geographic scope. All right. I'm going to put a  
19 time --

20 MR. DESPOTAKIS: I guess --

21 THE COURT: I mean, I don't want to give short  
22 shrift to these arguments, because I know they're important to  
23 you, and so I will go through the next -- it looks like the  
24 three more points and I'll -- I don't want the parties to keep  
25 repeating, but I will hear you on it so that we can -- you can

1 move forward with some certainty as to what you need to do.

2 All right. So the use of the fake Obama signatures; what  
3 exactly are you looking for?

4 MS. WEISSMAN: Exactly that. Any record that the  
5 court [sic] has in their possession, that the court's [sic]  
6 aware of or was aware of, that --

7 THE COURT: The court; you mean --

8 MS. WEISSMAN: I'm sorry.

9 THE COURT: -- the defendant? I'm aware of mine.

10 MS. WEISSMAN: That the defendant is aware of,  
11 excuse me -- that defendant Bank of America is aware of about  
12 the use of the signature. Look, I mean, Your Honor, this is  
13 very similar. Bank of America says that, you know, it's  
14 impossible to comply, it handles an enormous volume of checks.  
15 I mean, have they spoken to anybody at the bank about how hard  
16 it would be to do some basic key word search to look up "Obama  
17 signature and state check," or "Obama signature and" --

18 THE COURT: So you want to know if they were already  
19 on notice that this was a fraud, a fraudulent thing?

20 MS. WEISSMAN: That's all that we're trying to  
21 understand.

22 THE COURT: Right.

23 MS. WEISSMAN: And again, because there's multiple  
24 fraud scams at play here --

25 THE COURT: This particular one.

1 MS. WEISSMAN: -- so we're entitled to know whether  
2 they had knowledge that this was one of them.

3 THE COURT: Right. Okay. So why is that  
4 problematic?

5 MR. DESPOTAKIS: Again, we're focusing on  
6 Ms. Ruane's complaint. The bank looked at these checks,  
7 concluded they were fraudulent, and then made its decision.  
8 The issue is not the checks. Everybody knows those checks are  
9 counterfeit. The issue is --

10 THE COURT: Why does everybody know that?

11 MR. DESPOTAKIS: -- was Ms. Ruane involved?

12 THE COURT: Well, why would everybody know that it  
13 was counterfeit?

14 MR. DESPOTAKIS: Let me --

15 THE COURT: I mean, presumably Barack Obama does  
16 write checks --

17 MR. DESPOTAKIS: Yeah, there's --

18 THE COURT: -- as a person.

19 MR. DESPOTAKIS: There's a feature to check cashing  
20 that perhaps needs to be explained a little bit. The days of  
21 the horse and buggy in a local Wells Fargo office --

22 THE COURT: Well, no --

23 MR. DESPOTAKIS: No, I'm just saying, Your Honor --

24 THE COURT: No, don't do that.

25 MR. DESPOTAKIS: No, I'm just saying --

1 THE COURT: I know how checks work.

2 MR. DESPOTAKIS: -- checks go through electronically  
3 at high speed transmissions. There are millions of checks that  
4 are exchanged through the interbank payment system every day.  
5 These checks --

6 THE COURT: So it's --

7 MR. DESPOTAKIS: -- are not sorted and looked at by  
8 a human being.

9 THE COURT: Well, so how were they pulled out for  
10 investigation?

11 MR. DESPOTAKIS: We're back to the conundrum that --

12 THE COURT: Well, then you've got to figure it out.

13 MR. DESPOTAKIS: -- which is why I will be --

14 THE COURT: I mean, it's not for the Court to --

15 MR. DESPOTAKIS: -- speaking to my client.

16 THE COURT: Right, so that's the problem, okay? And  
17 if that's what's holding up discovery, you need to have this  
18 cleared up. And if you don't get it cleared up, I'm going to  
19 order your client to come in here so I can make sure they  
20 understand that just because they've got a problem doesn't mean  
21 that they get to hold up discovery and the progress of a case  
22 in this court. Right?

23 MR. DESPOTAKIS: I've committed to discuss that with  
24 the client.

25 THE COURT: I mean, it just -- it's like I know it's

1 a problem, it's a conundrum, but you've got to figure it out.  
2 It's not for the Court to fig -- unless you want the Court to  
3 make some rulings, and then I'll just make some rulings, and  
4 then --

5 MR. DESPOTAKIS: I'll have --

6 THE COURT: -- you don't have a conundrum anymore,  
7 right?

8 MR. DESPOTAKIS: It may be a relief, but --

9 THE COURT: Well, no, I'm just saying --

10 MR. DESPOTAKIS: -- I will discuss this with the  
11 client.

12 THE COURT: -- at the moment I've been exercising a  
13 lot of restraint because you have to figure things out, but at  
14 some point I may just make a ruling and if you don't like it  
15 you can appeal it because this is becoming a little ridiculous  
16 that every time we have a discovery conference this conundrum  
17 comes up and then it's sort of like, "Well, I don't know what I  
18 should do." You know, this is a rock in a hard place.

19 MR. DESPOTAKIS: Right.

20 THE COURT: I appreciate that, but you've got to  
21 solve it. All right?

22 MR. DESPOTAKIS: And I think it will be solved, as I  
23 committed to do.

24 THE COURT: Yes.

25 MR. DESPOTAKIS: I will have that conversation.

1 THE COURT: All right.

2 MR. DESPOTAKIS: I will get back to plaintiffs by  
3 Monday at the latest.

4 THE COURT: But you've got to to work it out, but as  
5 far as --

6 MR. DESPOTAKIS: I --

7 THE COURT: -- the knowledge -- what the bank's  
8 knowledge of this Obama signature scam, I think it is highly  
9 relevant, and so you need to turn it over, and you can figure  
10 out with plaintiff's counsel how you're going to do that,  
11 whether it's key word searches, whether it's a specific  
12 location of files, but you need to -- but the subject matter is  
13 certainly relevant.

14 MR. DESPOTAKIS: I think, Your Honor, much will flow  
15 from the decision of the bank, once I speak to the client and  
16 speak to plaintiff's counsel.

17 THE COURT: So I'm ordering that C be turned over  
18 and that data or security breaches with regard to plaintiff's  
19 personal information, that to me actually seems self-evident,  
20 in light of some highly publicized data and security breaches  
21 in the news in recent months and years. And so if there are  
22 security breaches that might have led Ms. Ruane's information  
23 to have been compromised, I think they're -- plaintiffs are  
24 entitled to get that.

25 MR. DESPOTAKIS: We have responded to that in

1 written discovery and made it clear in that response that there  
2 were no data security breaches regarding her account, that the  
3 only breach was regarding I think a 2011 or 2013 ATM card that  
4 was not linked to any account information of Ms. Ruane.

5 THE COURT: So there was a breach of one ATM card?

6 MR. DESPOTAKIS: There was a breach of an ATM card  
7 and the embedded data on that card did not translate to, nor  
8 did it include information regarding her account --

9 THE COURT: Okay.

10 MR. DESPOTAKIS: -- her passwords, or anything.

11 THE COURT: So there wasn't kind of a --

12 MR. WEISSBERG: [Indiscernible.]

13 MR. DESPOTAKIS: Where was it?

14 MR. WEISSBERG: It was not a BANA either. It was --

15 MR. DESPOTAKIS: Oh, I'm sorry, it was a breach  
16 at -- yeah, but it involved a BANA card. It was a breach at  
17 Walmart or one of those places.

18 THE COURT: Right, but it's not one of the systemic  
19 breaches where there's a hacker that goes in and grabs a bunch  
20 of information?

21 MR. DESPOTAKIS: That's correct.

22 THE COURT: Okay.

23 MR. DESPOTAKIS: The answer is "no" and we've  
24 responded to it clearly.

25 THE COURT: All right. So is that sufficient?

1 MS. WEISSMAN: Your Honor, given that over the  
2 course of seven years, as Your Honor said, there's many data  
3 breaches --

4 THE COURT: Well --

5 MR. WEISSBERG: -- what we would just ask for at  
6 this point is an affidavit at least stating what data breaches  
7 occurred and affirming that they -- confirming, excuse me, that  
8 they did not affect her information. Again, the request  
9 specifically says for data breaches that may have or did affect  
10 her personal information.

11 THE COURT: All right. So I want to make sure that  
12 it's in writing so it's clear about what specifically the  
13 breach was and just -- you need to make sure that you've got  
14 it -- got that information from somebody who knows firsthand.

15 MR. DESPOTAKIS: Yeah, it is in our response. We  
16 said there was no breach involving her account. How much  
17 clearer can we be?

18 THE COURT: All right. So what is the -- is it just  
19 the "may"?

20 MS. WEISSMAN: I'm sorry?

21 THE COURT: Is it just the "may" as opposed to the  
22 "did"?

23 MS. WEISSMAN: We would just like definite,  
24 emphatic, and an affidavit from somebody with actual knowledge  
25 of this from the bank who can say that there wasn't any data



1 breaches over the course of the seven-year period --

2 THE COURT: Well, but the question wasn't -- okay,  
3 so I hear you.

4 MR. DESPOTAKIS: Her account.

5 THE COURT: You've qualified the statement and so I  
6 think what they're looking for is a more general statement;  
7 number 1, no data breaches other than the one, if that's the  
8 case --

9 MR. DESPOTAKIS: Involving her account -- involving  
10 her, yes.

11 THE COURT: No, the question was whether there were  
12 any data breaches.

13 MR. DESPOTAKIS: Your Honor, that's irrelevant, it's  
14 broad, and it's got nothing to do with this case. We've  
15 given -- if they need to ask this in the deposition of the  
16 bank's witness, they'll get the same answer they've got in this  
17 writing. Nothing affecting --

18 THE COURT: But the --

19 MR. DESPOTAKIS: -- Ms. Ruane --

20 THE COURT: So there may have been data breaches,  
21 but they're not relevant to this case, because they didn't come  
22 clear -- they -- there's no possibility that they may have  
23 impacted her account.

24 MR. DESPOTAKIS: That is correct, Your Honor.

25 THE COURT: Okay. So --

1 MR. DESPOTAKIS: Because the data breach that was  
2 identified by the bank that involved her, as it searched its  
3 records, was not an account data breach.

4 THE COURT: Okay. So that data breach did involve  
5 her?

6 MR. DESPOTAKIS: But not her account.

7 THE COURT: Right. Okay.

8 MR. DESPOTAKIS: It involved an ATM debit card --

9 THE COURT: I see.

10 MR. DESPOTAKIS: -- that would not have linked  
11 information.

12 THE COURT: Okay.

13 MR. DESPOTAKIS: So looking at that card would tell  
14 them nothing about her account.

15 THE COURT: All right. So go back to the -- what  
16 was submitted in response to your -- I don't know if it's an  
17 interrogatory or a document request, and then make sure that it  
18 has the information that's clear. All right? Because if you  
19 need it to be crafted a different way, please just let  
20 Mr. Despotakis know so that you can close the hole that you  
21 think might have been created by the ambiguity of the wording.  
22 All right? So please just go back and revisit that and so that  
23 both sides are satisfied that you understand what has been  
24 asked and what has been responded. All right. So I will deny  
25 that, subject to any further dispute on it, because it sounds

1 like it's already been responded to, but if there are further  
2 problems you can bring it up.

3           So then you've got the E, which is the accuracy of  
4 Bank of America's investigations into claims of unauthorized  
5 transactions and negative reporting. And so how are you  
6 determining the accuracy? Because you also make this claim  
7 about "routinely blames customers with low balances." I don't  
8 know that those -- how those are related. So, Ms. Weissman,  
9 tell me more about --

10           MS. WEISSMAN: Yes, Your Honor.

11           THE COURT: -- what you mean by "the accuracy."

12           MS. WEISSMAN: Yes, Your Honor. So our  
13 understanding is that Bank of America would have some documents  
14 in its possession concerning the overall accuracy; in other  
15 words, when the bank finds that -- it turns out that  
16 information, for example, that was reported to a consumer  
17 reporting agency in fact was wrong and has to remove that  
18 information, or when the bank determines that, you know, on  
19 fake checks that it thought a consumer -- an account holder was  
20 liable for, in fact they weren't liable for.

21           In August, as part of our discovery, Bank of America  
22 sent us interagency guidelines, I referred to them earlier,  
23 from the CFPD, which also seemed to suggest quite clearly that,  
24 you know, a furnisher would go back and do some kinds of review  
25 of its historical records relating to accuracy and consider

1 past error. So we're just trying to understand what  
2 information Bank of America has in its possession, that's it's  
3 aware of, that speaks to accuracies and inaccuracies of its  
4 reporting to CRA's and of its investigations into these types  
5 of fake checks.

6 THE COURT: So are you concerned about the actual  
7 inaccuracy, or are you concerned about their review of whether  
8 they're accurate?

9 MS. WEISSMAN: In this particular moment, I think  
10 we're just concerned about what documents they generated and  
11 what doc -- and what information they've looked at themselves,  
12 because I suppose it sort of speaks a little bit to both,  
13 right? It goes to, have they actually gone ahead and done some  
14 kind of historical analysis to know if there are past  
15 inaccuracies or not, and also if they have done that kind of  
16 analysis and have that information, how, if at all, might that  
17 have been considered in the context of this particular case,  
18 and how sure or not sure the bank could be in the reliability  
19 of the information that it was coming up with as a result of  
20 the investigation.

21 THE COURT: Okay. So the first one is sort of a  
22 process issue, have they gone back to review accuracy, because  
23 you say they have a duty to do that, and then -- or an  
24 obligation to do that, and the second is, what were the results  
25 of those investigations if they did them? So if they didn't do

1 it, you're thinking that might be a problem, and if they did do  
2 it, you want to figure out how accurate their -- what the  
3 result was in terms of accuracy.

4 MS. WEISSMAN: Right, which of course goes to their  
5 knowledge --

6 THE COURT: Yes, I get that.

7 MS. WEISSMAN: -- the information they had,  
8 willfulness.

9 THE COURT: Okay. Mr. Despotakis?

10 MR. DESPOTAKIS: There are a couple of problems with  
11 what's being requested. This category in general falls within  
12 the same kind of analysis as average time to handle disputes.

13 THE COURT: No, not really, because if there is some  
14 guideline as to going back and doing reviews of accuracy, the  
15 quest -- the first question is, is the bank doing that, and if  
16 the bank isn't, then that's simple, the bank's not doing it.  
17 Okay?

18 MR. DESPOTAKIS: Oh.

19 THE COURT: And if they are, then what have they  
20 found to be the case?

21 MR. DESPOTAKIS: Well, here is my next point, Your  
22 Honor, to be made. Accuracy is not required under the statute,  
23 in terms of the liability in the statutory scheme at all.

24 THE COURT: No, that's not the point. It's about  
25 the process. That's why I was very specific. The first

1 instance it's about the process. Do you know whether your  
2 client was going back to review the accuracy of their reports?

3 MR. DESPOTAKIS: I do not know, but we objected to  
4 this on the basis that accuracy has nothing to do with us here,  
5 because we've already said, and disclosed to counsel for the  
6 plaintiff, that the basis for the bank's decision was based on  
7 the specific --

8 THE COURT: I know that.

9 MR. DESPOTAKIS: -- documentary information.

10 THE COURT: I've heard that repeatedly.

11 MR. DESPOTAKIS: Okay. What --

12 THE COURT: The question is --

13 MR. DESPOTAKIS: Yeah.

14 THE COURT: -- you can do the investigation, but if  
15 there's some process where people -- where an institution goes  
16 back and reviews what they've done, just to double check and  
17 make sure everything is right, the first question is, do they  
18 do that? Maybe you're saying they don't have an obligation to  
19 do it. That's fine. But the question is simple, do they do  
20 it, right? It's yes or no. And then if it's no, end of issue,  
21 they're not doing it. If they do it, what did they find?

22 Now, you can argue at the trial or whatever about  
23 whether it's important that the accuracy or, et cetera, but I  
24 think the plaintiffs are entitled to know to what extent is the  
25 bank going back to double-check things, and if they go back and

1 double-check things and says, "Oops, we missed this," are they  
2 then revising their procedures so that that error doesn't  
3 happen again? That is relevant to whether it's good faith and  
4 reasonable.

5 MR. DESPOTAKIS: Well, now we've reached the third  
6 prong, though, of my point. That would be at best a remedial  
7 measure, and accuracy is not required under the statute. I  
8 have to come back to that, Your Honor.

9 THE COURT: Well, but it's not remedial if it's --  
10 if you're talking about after the -- what happened here. It's  
11 pre-medial if it -- the review was happening before her  
12 investigation. It's not remedial as to her investigation.

13 MR. DESPOTAKIS: The --

14 THE COURT: It's about what the bank knew about  
15 their process, and if the bank knew before this problem came up  
16 with her that there was a problem with their process, because  
17 they went back and reviewed it and it was like, "Oh, you know  
18 what, we should have two investigators on it rather than one  
19 investigator," because, you know, whatever, and they don't fix  
20 it, then there might be an issue with the good faith and  
21 reasonableness of the investigation. So the plaintiffs are  
22 entitled to understand that process. Okay?

23 MR. DESPOTAKIS: I -- Your Honor, on that one, I  
24 would leave it to the Court to issue a ruling, because our  
25 position is, it has nothing to do with the investigation done

1 on Ms. Ruane's claim. It was based on --

2 THE COURT: The question is whether it was  
3 reasonable or not. Okay?

4 MR. DESPOTAKIS: That's correct, that's correct.

5 THE COURT: Yes, and so --

6 MR. DESPOTAKIS: And we dis --

7 THE COURT: -- my ruling is that I think that this  
8 information is relevant to the -- to that point, about whether  
9 the investigation was reasonable, and so you need to turn over  
10 or respond to whether Bank of America did any review of  
11 completed investigations to see if there were past errors, and  
12 if they did, what did they find.

13 MR. DESPOTAKIS: When you're saying "review," are  
14 you ordering it in point in time prior to Ms. Ruane's --

15 THE COURT: Yeah, what is the time frame that you've  
16 asked for?

17 MR. DESPOTAKIS: Hers was September 2016.

18 THE COURT: What's the time frame?

19 MS. WEISSMAN: The time frame in our request is --  
20 it goes from 2011, I believe, to the present. I would have  
21 to --

22 THE COURT: Okay. So I think --

23 MS. WEISSMAN: -- remind myself whether it's --

24 THE COURT: -- it should stop at the point that the  
25 incident happened, because otherwise it is remedial. Okay? So



1 up till the time of the incident, and you're saying 2011, which  
2 would be five years before, so 2011 to the incident itself.

3 Okay? All right. And there was the certain other accounts?

4 MS. WEISSMAN: Yeah, I can explain this a little  
5 bit, Your Honor. So again -- and my apologies. The next time  
6 we will request the Court's permission as needed to file a  
7 longer briefing. So the other pieces of 1-E -- one -- well,  
8 two of them that are I believe very concrete and  
9 straightforward are the percentage of disputes by account  
10 holders who BANA had reported for suspected fraud activity to  
11 Chex, just as they had reported plaintiff, where the Court  
12 determined that -- I'm sorry, where the bank determined that  
13 the information was accurate and continued to report it. So  
14 the percent of dispute -- percentage of disputes where people  
15 said, "Hey, this negative reporting of me is not accurate," and  
16 the bank said, "It is accurate," and continued to report it as  
17 they did in this case.

18 THE COURT: Why is that important? Because it's --  
19 why is that relevant, because it doesn't involve your client?

20 MS. WEISSMAN: We believe it's relevant, Your Honor,  
21 because if the -- if in 98 percent of cases when somebody says,  
22 "Hey, this is not accurate," and the bank continues to report  
23 it, then that goes to this question of whether or not their  
24 procedures on the whole are reasonable, which is a requirement  
25 that they have reasonable procedures in place.

1 THE COURT: Well, but again, if the percentages  
2 creates a false accuracy, because percentages are just an  
3 aggregation, and it's only as good as the parameters that you  
4 put around the data, and so, you know, whether they're  
5 reporting 99 percent or not doesn't seem to shed any light on  
6 your client. She could be in the one percent.

7 MS. WEISSMAN: Part of allegations, though, in the  
8 cases, that this is a pattern and this is part of repeated  
9 behavior, and so this is getting specifically at that, and  
10 perhaps less at the reasonableness of the investigation, with  
11 regard to her specifically.

12 THE COURT: And why is the -- what are you -- what  
13 is the --

14 MS. WEISSMAN: Because --

15 THE COURT: -- cause of action on the pattern?

16 MS. WEISSMAN: Yes, because under the Fair Credit  
17 Reporting Act, Your Honor, punitive damages are available for  
18 conduct that's willful, and so showing that this was part of a  
19 repeated pattern on the part of the bank is a key way that one  
20 might show that the conduct was in fact willful.

21 THE COURT: And so what specifically is the  
22 information that you're looking for?

23 MS. WEISSMAN: So there's sort of two components.  
24 So we're looking to understand -- and the percentage basis,  
25 again, because that seems like a reasonable way of trying to

1 actually circumscribe what we're asking for, both of the amount  
2 of times that somebody disputed the bank's reporting of them  
3 versus actual fraud activity, where the bank decided to  
4 continue the reporting in spite of the dispute, and similarly  
5 the percentage of times where somebody disputed the bank's  
6 determination that they were responsible for unauthorized  
7 transactions, where the Court [sic] -- I'm sorry, where the  
8 bank denied their dispute in that context as well and said,  
9 "No, we are holding you responsible, even though you say that  
10 you didn't do that."

11 THE COURT: Okay. But the percentage always -- the  
12 percentage has two numbers to it, so what are you trying to --  
13 it's what number versus what number?

14 MS. WEISSMAN: Yes, exactly, and so we could have  
15 asked for it either way. So in the context of suspected fraud  
16 activity being reported to the CRAs, it's the number of times  
17 that an account -- I'm sorry, the percentage, lets say, that an  
18 account holder disputed the negative reporting and Bank of  
19 America kept the information, would be one number, kept the  
20 information on the report, said to the CRA, "Yes, continue to  
21 report suspected fraud activity," versus the number percentage  
22 that the account holder, multiple account holders said, you  
23 know, "I'm disputing this reporting of me for suspected fraud  
24 activity," and the bank said -- went back, did a  
25 reinvestigation and removed the information. So those are the

1 dueling numbers; the percentage of times that the information  
2 remained on the report, and the percentage of times that the  
3 information was removed from a consumer report after --

4 THE COURT: So those should add up to 100, right --

5 MS. WEISSMAN: Yes.

6 THE COURT: -- because those are the two --

7 MS. WEISSMAN: Yes.

8 THE COURT: -- scenarios?

9 MS. WEISSMAN: Yes.

10 THE COURT: So you're saying of the cases where a  
11 consumer disputes how many times, what is the percentage of  
12 times where it's reported, nevertheless --

13 MS. WEISSMAN: Correct.

14 THE COURT: -- versus when Bank of America does go  
15 back and reinvestigates?

16 MS. WEISSMAN: Yes.

17 THE COURT: Okay.

18 MR. DESPOTAKIS: Your Honor --

19 THE COURT: Yes.

20 MR. DESPOTAKIS: -- if may? Apart from the  
21 percentage issue, you know, that you've identified yourself,  
22 you have the other issue. What claim? Things are reported to  
23 Chex and to EWS or complaints are made to the bank, but they  
24 could be credit card disputes, those are reported to the bank  
25 as claims, they could be forged checks drawn on accounts of

1 depositors who say, "I didn't sign that check," other bills --

2 THE COURT: I think that's what we're talking about  
3 here.

4 MR. DESPOTAKIS: There could be sold account  
5 scenarios, which is what Ms. Ruane's complaint was determined  
6 to be. There could be identity theft.

7 THE COURT: Okay.

8 MR. DESPOTAKIS: So when we say "claims," that's a  
9 broad --

10 THE COURT: Yeah, so again --

11 MR. DESPOTAKIS: -- broad, broad landscape.

12 THE COURT: -- if you had asked plaintiffs, they  
13 might have -- plaintiff's counsel, they might have told you  
14 what they're specifically looking for.

15 MR. DESPOTAKIS: Well, we dispute the relevancy of  
16 the thing altogether.

17 THE COURT: Okay. So why --

18 MR. DESPOTAKIS: And if the Court's going to order  
19 we comply, there has to be some limitations in terms of the  
20 content.

21 THE COURT: Well, the content is a number, which is  
22 based on two numbers, right? So percentage is always two  
23 numbers and the -- it sounds like the two numbers here are the  
24 number of disputes where customers -- the number of cases where  
25 a customer has disputed based on fraud, and you're saying it's

1 not clear because it might be a credit card fraud versus a --

2 MR. DESPOTAKIS: Right, we're talking about --

3 THE COURT: -- credit card versus ATM fraud, okay,  
4 so we can talk about that. And then the other number in the  
5 percentage is, notwithstanding the dispute, how often is Bank  
6 of America reporting that fraud, nevertheless, versus the times  
7 they go back and reinvestigate it.

8 MR. DESPOTAKIS: To the extent the bank has those  
9 metrics.

10 THE COURT: Yes, of course.

11 MR. DESPOTAKIS: Okay.

12 THE COURT: Okay. So --

13 MR. DESPOTAKIS: But we need to define the type of  
14 fraud we're talking about.

15 THE COURT: Yes.

16 MR. DESPOTAKIS: I has to be the deposit of  
17 counterfeit checks into an account.

18 THE COURT: That's right. Right. Okay. So can  
19 you --

20 MS. WEISSMAN: Yes, so --

21 THE COURT: -- confer on the parameters of that?

22 MS. WEISSMAN: Yes.

23 THE COURT: The concept is reasonable.

24 MS. WEISSMAN: Yes.

25 THE COURT: I just need you to iron out what the

1 parameters are, in terms of those -- again, those two numbers.

2 Okay?

3 MS. WEISSMAN: Um-hum.

4 MR. DESPOTAKIS: And time frame, Your Honor.

5 THE COURT: And time frame. Okay? So I will grant  
6 you --

7 MS. WEISSMAN: And --

8 THE COURT: -- for that certain -- the other -- the  
9 dispute percentage --

10 MS. WEISSMAN: The -- yes, and Your Hon --

11 THE COURT: -- dispute -- the reporting versus  
12 dispute percentage.

13 MS. WEISSMAN: Right. And, Your Honor, that goes to  
14 both, again, suspected fraud activity being reported to CRA's  
15 and also to determinations regarding unauthorized transactions.  
16 So there's two different requests and we're happy to confer  
17 additionally and make sure it's clear exactly what we're  
18 looking for.

19 THE COURT: Right. Okay.

20 MS. WEISSMAN: And there's just one more component  
21 to this final category, which is documents and communications,  
22 so -- and this is sort of along similar lines, but basically  
23 we're looking for information -- some information about bank  
24 accounts, where let's say Bank of America on the one hand  
25 reported somebody for suspected fraud activity. As we just

1 said, the person disputes it, and the bank determines that, no,  
2 they are in fact liable for the fraud or they're not. So that  
3 was what we just talked about in terms of this percentage.

4 But we're also interested in some basic information  
5 about particular accounts, where this takes place on one side  
6 of the equation or the other. Yes, we're keeping the  
7 information, or, no, we're not. We're looking for information,  
8 for example, about things like the average -- I'm sorry, not  
9 the average, but the monthly balance in such accounts and  
10 information about the ZIP Code of such accounts, because we're  
11 trying to, again, understand -- back to something Your Honor  
12 brought up earlier, we're trying to really hone in on this  
13 question of whether the bank's treatment of low income people  
14 here is different than its treatment of more affluent  
15 individuals. And so we've identified things like ZIP Code and  
16 things like account balance as ways to hone in.

17 THE COURT: I don't think that's relevant. I mean,  
18 I know that's your argument, but that's really not here -- if  
19 it's a question you want to ask at deposition, "Do you take  
20 those things into account?" you can ask it. I think ZIP Codes  
21 are really rough. I mean, you know, you've got ZIP Codes that  
22 cut through really different neighborhoods. And then the  
23 monthly balance, it's not at all clear that that's information  
24 that was available at the time of these disputes.

25 Now, if you have a deposition and someone tells you



1 that, "Yeah, we have access to this information and we take it  
2 into account," that becomes a different issue. You can have  
3 follow-up discovery on that. But at the moment I don't see  
4 that you should get specific information related to that.

5 MR. DESPOTAKIS: Again, Your Honor --

6 THE COURT: Yeah.

7 MR. DESPOTAKIS: -- so I'm clear, we're talking  
8 about claims relating to the deposit of counterfeit checks, not  
9 credit cards, not other types of claims involving accounts,  
10 because that's what this case is about.

11 THE COURT: Yes, and I've asked the parties to work  
12 that part out --

13 MR. DESPOTAKIS: Okay. Just --

14 THE COURT: But this second part is something else.

15 MR. DESPOTAKIS: Okay.

16 THE COURT: What Ms. Weissman was talking about just  
17 now is something else.

18 MR. WEISSBERG: Well, Your Honor, if I could just  
19 make a comment, and this just goes to the relevancy of what the  
20 bank is being asked to do. When a customer makes a complaint,  
21 a report is made and a customer disputes that complaint and  
22 they continue the report or don't continue the report, that  
23 doesn't bear on the accuracy -- if she wants to generalize as  
24 to accuracy, just because a customer disputed a claim doesn't  
25 mean that the customer was right or not right. It doesn't --

1 you can't generalize or draw inferences from that. A customer  
2 could dispute a claim, yet they're complicit or involved. If  
3 the claim turns out to be unfounded, well, we're now going to  
4 add that to a statistic of all the disputed claims by customers  
5 that are unfounded as a percentage, it doesn't seem to bear --  
6 I don't see how you could extrapolate to then conclude, "Well,  
7 look" -- because they want to take this information and present  
8 it to a jury, that's the only thing I can infer to say, "Well,  
9 these are the percentages of cases where customers made a  
10 complaint, right, but they continued reporting." Okay, but  
11 even though the customer disputed that, well, maybe 90 percent  
12 of those disputes were wrong and --

13 THE COURT: They're trying to find out to what  
14 degree BANA adheres to a policy that the customer's always  
15 right, and --

16 MR. WEISSBERG: Here's the thing. It's a slippery  
17 slope, because now --

18 THE COURT: Yes, and you can certainly make that  
19 argu --

20 MR. WEISSBERG: -- we're litigating not this case,  
21 we're litigating all these other cases --

22 THE COURT: You can certainly make that argument,  
23 but I think that the rough outlines of what Bank of America is  
24 doing in this case is relevant. All right. So just work out  
25 the details in terms of the time period and the parameters that

1 they -- yes.

2 MS. WEISSMAN: Your Honor, may I make one more  
3 comment?

4 THE COURT: Yes.

5 MS. WEISSMAN: We've been suffering from a dearth of  
6 information concerning why Bank of America decided to conclude  
7 that our client was liable. The only real basis that they seem  
8 to have shared with us was that our client is a person of  
9 modest means. And they did provide information that shows that  
10 they do have the account balance for her at the time and that  
11 that's they took into consideration, which is the basis for our  
12 request, because we believe that this shows a potential bias in  
13 how they are, based on their statements and based on what  
14 they've provided.

15 THE COURT: Well, but if they've already told you  
16 that it was something they took into account, then you've got  
17 that information. Why do you need --

18 MS. WEISSMAN: We're not --

19 THE COURT: -- any other people's information?

20 MS. WEISSMAN: Well, because we believe that that's  
21 an unreasonable basis to conclude that --

22 THE COURT: And it may be and you can argue that,  
23 but I'm just saying to find out whether they're doing it with  
24 other people doesn't matter. If they've already -- if what  
25 you're saying is they've already told you that they did take

1 this consideration, then you've got what you need.

2 MS. WEISSMAN: Your Honor, but that's the only thing  
3 that they've suggested. What they have said very clearly is  
4 that there are other factors as well --

5 THE COURT: Yes, and at the beginning I said -- or  
6 earlier in this discussion I said the parties need to sit down  
7 and talk through exactly what happened here --

8 MS. WEISSMAN: Yes, Your --

9 THE COURT: -- because I do appreciate that you  
10 haven't been given a lot of information, and that's frustrating  
11 to me as well. Okay?

12 MS. WEISSMAN: So what we're just trying to get at  
13 is whether those other reasons, that we may learn of at some  
14 time, are simply pretext for the real reason that they are  
15 concluding that our client was -- and others in her  
16 situation --

17 THE COURT: And you'll get all the information as to  
18 how this investigation was done and what Bank of America  
19 considered, and if you want to make an argument that they  
20 shouldn't have considered income, that's fine, because if they  
21 tell you that's what they did consider, then you can argue that  
22 they shouldn't have.

23 MS. WEISSMAN: Okay.

24 THE COURT: But what they did with other people, I'm  
25 just saying I don't think that's relevant at this point. Okay?

1 MS. WEISSMAN: Okay. Thank you, Your Honor.

2 MR. DESPOTAKIS: Yeah, and I appreciate what you've  
3 just said, just for the record. The issue of the consideration  
4 of the client's balance was one of the points considered in the  
5 context of, well, all of a sudden five checks --

6 THE COURT: Yes, I know --

7 MR. DESPOTAKIS: -- for a significant amount --

8 THE COURT: -- and I don't need to --

9 MR. DESPOTAKIS: Okay, so we don't need to go over  
10 that, but --

11 THE COURT: Yes, I appreciate that. I'm just trying  
12 to resolve the discovery issues.

13 MR. DESPOTAKIS: All right.

14 THE COURT: Okay? So I'm not going to burden my law  
15 clerk with making all the rulings in something here, because I  
16 think there are some things -- I'm just going to put on the  
17 record, granted in part and denied in part, right, and I want  
18 the parties to be clear and go over it, and order the  
19 transcript if you need to to figure out what you're supposed to  
20 do. I try to be clear. If there are things that are  
21 ambiguous, you can come back to me and ask. And so just to  
22 give you fair warning, that's how I'm going to deal with this,  
23 because it's a lot of stuff. And there are some things that  
24 the parties have committed to do unilaterally, there are some  
25 things the parties have considered -- committed to do

1 collectively, and you should go ahead and do that.

2           As a general matter, I am going to repeat, parties  
3 need to do a better job talking to each other and trying to  
4 understand what the other side is asking for, and getting  
5 clarification instead of just say, "I don't know what you're  
6 talking about." All right? I know the rules sort of allow you  
7 to just assert "vague and over-broad," but I think at this late  
8 stage, and this is a late stage in this proceedings, you've got  
9 to get more clarity, and you get the clarity by talking to each  
10 other. Come to agreements when it's possible and reasonable.

11           And I would say most importantly, Mr. Despotakis,  
12 you need to talk to your client and figure out -- get all the  
13 information you need, because I sense that there's still a lot  
14 of gaps in your knowledge. Okay? And so I need to make sure  
15 that you're very clear and thorough in your understanding of  
16 your client's processes. And I will also reiterate that if I  
17 sense at our next hearing, when these issues come up, that you  
18 haven't gotten that knowledge, maybe it's not your fault,  
19 right, that your client just hasn't given it to you, then I  
20 will order your client to be here so that some of these issues  
21 can be resolved so we don't have these gaps about, "I don't --  
22 I'm not sure what was happening and I'm not sure what the  
23 process is. I'm not sure where these things might be held."

24           And so I just feel like this case has been around a  
25 pretty long time. For my docket, this is a pretty old case,

1 okay, so you've got to get moving and start getting to those  
2 depositions and moving forward, because I -- it may be that as  
3 you move forward there is room for settlement, okay, and I  
4 don't want you to lose the opportunity because you've been  
5 expending so many resources in these kinds of discovery  
6 disputes. We've had a three-hour discovery hearing. This is  
7 the longest discovery hearing I've had in any of my cases, and  
8 I think a lot of this could have been avoided or cut short if  
9 the parties did a better job talking to their clients and  
10 talking to each other.

11           So I'm happy to have resolved a lot of these issues.  
12 I hope I've been clear. If I haven't been, I'm happy to hear  
13 you at a later date and tell me what you need clarification on,  
14 but not before you talk to each other and try to work it out on  
15 your own. All right?

16           Ms. Weissman, do you have anything to add?

17           MS. WEISSMAN: Yeah, thank you, Your Honor, and I'm  
18 sorry to bring up one more thing. According to the initial  
19 scheduling order, the close of paper discovery is set to end on  
20 November 9th --

21           THE COURT: Yes, so you --

22           MS. WEISSMAN: -- and I wanted to bring that to the  
23 Court's attention --

24           THE COURT: Yes.

25           MS. WEISSMAN: -- since there are some matters

1 continuing.

2 THE COURT: Right. And so part of what you need to  
3 do is to confer and propose additional extensions if you need  
4 it. If you can still make -- meet it, great, but if you can't,  
5 then you need to, before the deadline comes, make a joint  
6 application with a new proposed scheduling order, all right, in  
7 light of all the rulings. Mr. Despotakis, is there anything  
8 you want to add?

9 MR. DESPOTAKIS: That's fine, Your Honor.

10 THE COURT: All right. And --

11 MR. DESPOTAKIS: And I will reach out and maybe we  
12 can have a conversation next week and try to at least go  
13 through our respective understanding of what the Court has  
14 ruled today and work those issues out.

15 THE COURT: Okay. Ms. Hanson --

16 MR. WEISSBERG: Not this week; next week.

17 THE COURT: Right. Ms. Hanson, do you have anything  
18 you want to add?

19 MS. HANSON: No, Your Honor. Thank you.

20 THE COURT: All right. And Mr. Wait?

21 MR. WAIT: No, Judge. Thank you.

22 THE COURT: All right. Thank you, everybody.

23 MR. WEISSBERG: Thank you, Your Honor.

24 MR. DESPOTAKIS: Thank you, Your Honor.

25 MR. BROMBERG: Thank you.



1 (Proceedings concluded at 1:07 p.m.)

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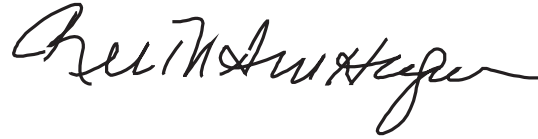
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1 I certify that the foregoing is a court transcript  
2 from an electronic sound recording of the proceedings in the  
3 above-entitled matter.

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7 Ruth Ann Hager, C.E.T.\*\*D-641

8 Dated: October 20, 2018  
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